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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD, MASSACHUSETTS
Petitioner,

vs.

NEW ENGLAND POWER COMPANY,
NEW ENGLAND ELECTRIC SYSTEM (NEES),
PACIFIC GAS & ELECTRIC COMPANY,
PG&E CORPORATION,
Respondents.

Petition For Writ Of Certiorari To The
United States Court of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in sustaining summary dismissal of the Town of Norwood's ("Norwood") complaint that respondents unlawfully conspired to fix prices for wholesale electric power under Section 1 of the Sherman Act to favor respondents and place Norwood in an anticompetitive position, based on respondents' claim of antitrust immunity under the filed rate doctrine based on the Federal Power Act, and where the Federal Energy Regulatory Commission ("FERC") declared that it would not review the fixed prices under the just and reasonable standards of the Federal Power Act requiring a cost-of-service basis because they were negotiated market-based rates.

2. Whether the court of appeals erred in sustaining summary dismissal of Norwood's claim for price squeeze under Section 2 of the Sherman Act, based on respondents' claim of antitrust immunity under the filed rate doctrine, based on the Federal Power Act.

3. Whether the court of appeals erred in ruling that the "antitrust savings clause" enacted by Congress in the Energy Policy Act of 1992 to amend the Federal Power Act to authorize open access orders by the FERC, precludes dismissal of Norwood's antitrust claims under the filed rate doctrine in the present case.

4. Whether the court of appeals erred in not following this Court's holding in *Square D Company* in sustaining dismissal of Norwood's complaint for declaratory and injunctive relief under Sections 1 and 2 of the Sherman Act on the basis of the filed rate doctrine.

5. Did the court of appeals deny Norwood due process by summarily dismissing Norwood's claim on the merits under Rule 12(b)(6) of the Federal Rules of Civil Procedure without answer, discovery, Rule 56 proceedings, or jury trial, contrary to the factual allegations of the complaint and affidavits submitted by Norwood?

RULE 14(1)(b) STATEMENT

The petitioner is the Town ofNorwood, Massachusetts. The names of the four (4) respondents are listed in the caption to this petition.

RULE 29.6 STATEMENT

Under Rule 29.6, the Town of Norwood believes that the respondents named herein are corporations.

Respondent New England Power Company is a wholly owned subsidiary of respondent New England Electric System (NEES) (which also has wholly owned subsidiaries Massachusetts Electric Company and Narragansett Electric Power Company).

Respondents Pacific Gas & Electric Company and PG&E Corporation (which also have wholly owned subsidiaries, U.S. Generating Company and U.S. Generating Company NE).

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No. 99-1047

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vs.

NEW ENGLAND POWER COMPANY,
NEW ENGLAND ELECTRIC SYSTEM (NEES),
PACIFIC GAS & ELECTRIC COMPANY,
PG&E CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App. 1a-28a) is reported at 202 F.3d 408 (1st Cir. 2000). [1] The opinion of the United States District Court for the District of Massachusetts (App. 29a-51a) is reported at 23 F.Supp. 2d 109 (D. Mass. 1998). [2]

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[1] The order of the United States Court of Appeals for the First Circuit denying the "Petition for Panel Rehearing" by the Town of Norwood was entered on February 28, 2000. App. 53a.

[2] The district court's order issued October 2, 1998 denying Norwood's motion for partial summary judgment with affidavits, filed September 28, 1998, as "moot." App. 52a.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2000, and its order denying Norwood's petition for panel rehearing was entered on February 28, 2000. This Court's jurisdiction is invoked under 28 U.S.C, §1254(1).

The district court below has federal subject matter jurisdiction over the Federal antitrust claims and jurisdiction to enforce its Decree and Order of April 12, 1983 thereunder pursuant to 28 U.S.C. §1331 (1994), §1337 (1995) and §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1997). The court of appeals below had jurisdiction over Norwood's appeal of the district court's final orders dismissing Norwood's complaint pursuant to 28 U.S.C. §1291 (1997).

STATUTES AND RULE INVOLVED

The statutes involved are Section 1, Sherman Act, 15 U.S.C. §1 (1997); Section 2, Sherman Act, 15 U.S.C. §2 (1997), App. 54a, and Section 722 of the Energy Policy Act of 1992, 16 U.S.C. § 824k (1997), App. 56a-57a; and Rule 12(b)(6) of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 12, App. 57a-58a.

STATEMENT OF THE CASE

Background

In 1974, Norwood filed a complaint for violation of the Federal antitrust laws against respondent, New England Power Company and Boston Edison Company in U.S. District Court, Massachusetts (Civil Action No. 74-4104-T). The complaint alleged violations of Section 1 of the Sherman Act against the defendants for an illegal agreement to divide territories and under Section 2 for refusals to wheel and (as to Edison), an illegal price squeeze based on its wholesale rates filed at FERC.

In 1980, Edison settled Norwood's antitrust case by agreeing to pay Norwood $5.4 million relating to its price squeeze claims and to commit to wheel firm power to Norwood from other suppliers. Norwood's 1974 antitrust case then proceeded against NEP (the remaining defendant) for its illegal agreement with Edison to divide territories and its refusal to sell firm wholesale requirements power to Norwood under "Tariff No. 1," a rate based on cost-of-service regulated by the FERC, under which NEP sold firm requirements wholesale power to its affiliates, including Mass Electric, the largest distributor in Massachusetts, and Narragansett Electric Power Company, the largest retail distributor in Rhode Island, in close proximity to Norwood. Norwood was and is in competition with NEP's affiliates for existing and new customers in the relevant retail market in which Norwood and NEP's affiliates operate.

In 1983, after three days of trial before a district judge, a Decree and Order of April 12, 1983 was entered by the court approving an antitrust Settlement Agreement and Power Contract, which required NEP to provide Norwood's wholesale power requirements under its Tariff 1 which, at all times, required that the rates thereunder be regulated by the FERC on a cost-of-service basis equal to that then being sold thereunder by NEP to its large distributor affiliates.

From 1983 to February 25, 1998, in accordance with the 1983 Decree and Order, NEP provided wholesale requirements electric power to Norwood at cost-of-service rates regulated by FERC under Tariff 1 on an equal basis to that which it provided to its distribution affiliates, Mass Electric and Narragansett.

Facts Underlying Present Case

On September 30, 1996, after voluntary negotiations from which Norwood was excluded, NEP and NEES, and NEP's affiliates, Mass Electric and Narragansett, entered an agreement with other competitive power suppliers in New England, including U.S. Generating Company (USGen), a subsidiary of defendants, PG&E and PG&E Corp., to fix prices for the sale of "standard offer service" wholesale power for up to 12 years, which would be available to Mass Electric and Narragansett for resale to their existing retail customers, but similar service would be denied to Norwood. In return, NEP agreed to sell its power supply business, terminate its Tariff 1 wholesale requirements power service to its distribution affiliates, Mass Electric and Narragansett, and thereafter become a seller of wholesale power at market-based rates not subject to cost-of-service regulation by the FERC, provided that NEP's affiliates pay NEP a stranded cost charge, called a "contract termination charge" ("CTC").

The prices set by NEP and PG&E for standard offer service were an integral part of NEP's subsequent sale of its power supply business to USGenNE, controlled by defendants PG&E and PG&E Corp. ("PG&E"). PG&E, through USGen, agreed to pay $500 million over book for the power facilities, only on condition that the right to supply all of the standard offer power to NEP's affiliates, Mass Electric and Narragansett be assigned to PG&E (USGen). This was done in a contract entered August 5, 1997. The standard offer fixed prices were substantially below the market basis for wholesale power in New England for over four years and would guarantee that the bulk of the existing retail customers of Mass Electric and Narragansett would not switch to other power suppliers. The denial of standard offer wholesale power to Norwood precluded Norwood from being able to compete for customers with Mass

Electric and Narragansett. Subsequently, the standard offer fixed prices escalated rapidly above the market price which Norwood alleged would result in causing an artificial increase in available market prices.

On April 14, 1997, Norwood filed a complaint in the Federal District Court for violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act and for breach of its Power Contract approved by the antitrust Decree and Order of April 12, 1983.

On February 25, 1998, based on an order by FERC, [3] NEP and its affiliates commenced operations as unregulated market-based power suppliers, and terminated Tariff 1 service to Mass Electric and Narragansett. At the same time, NEP converted its Tariff 1 rate to Norwood based on cost of service to a frozen fixed price which would require Norwood to pay NEP over 20 percent more for wholesale requirements power than NEP's affiliates, Mass Electric and Narragansett, would pay for such power. This would preclude Norwood from competing for retention of existing customers, or obtaining new customers to locate in Norwood. NEES, NEP's parent, through Mass Electric, is in direct competition with Norwood to the point of acquiring Norwood. NEES, acting through Mass Electric, has attempted to take over five (5) municipal light plants in the past 10 years as part of NEES' stated corporate plans to acquire municipal light plants and other local distribution companies. This could destroy Norwood's electric system as a competitor in New England.

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[3] *New England Power Co.,. Narragansett Electric Co., AllEnergy Marketing Co., LLC and USGen New England*, 82 FERC ¶61,179 (1998)

On March 3, 1998, Norwood, to preserve its municipal system and to mitigate damages in its pending complaint in district court, entered a contract with an alternate power supplier (Northeast Utilities), for service commencing April 1, 1998, which the FERC accepted. NEP did not appeal that ruling but filed a stranded cost as an amendment to the old, filed Tariff 1 to Norwood which was more than twice as high as the "CTC" applicable to its affiliates.

On April 24, 1998, Norwood amended its complaint in the district court.

In Count I of its complaint, Norwood alleged that NEP's conduct breached its Power Contract with NEP approved by the antitrust 1983 Decree and Order on a number of grounds.

In Count II, Norwood alleged that the defendants violated Section 1 of the Sherman Act for entering a conspiracy to fix unregulated wholesale electric prices in the relevant market which had an anticompetitive impact on Norwood, which was competing with NEP's affiliates in New England, and denied access to such service.

In Count III, Norwood alleged a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, for a price squeeze based on (1) the conversion of Norwood's Power Contract to a fixed price contract 20 percent higher than the wholesale rates available to NEP's affiliates, Mass. Electric and Narragansett; (2) NEP's attempt to assess a stranded cost in the form of a "contract termination charge" ("CTC") on Norwood that was approximately twice as high as a similar CTC; and (3) the denial to Norwood of the fixed standard offer wholesale prices available to NEP's affiliates which were substantially below Norwood's fixed price wholesale rates.

In its "Prayer for Relief", Norwood specifically requested the court for declaratory and injunctive relief relating to its claims for violations of Sections 1 and 2 of The Sherman Act.

On September 28, 1998, Norwood filed a motion for partial summary judgment with the district court, including affidavits by three witnesses. Norwood's motion was based on two grounds: that (1) NEP had breached the Power Contract mandated by the 1983 Decree and Order and (2) NEP by entertaining an agreement with others to fix prices for Standard Offer Service for wholesale power service had engaged in *per se* illegal price fixing in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

In the affidavits submitted by Norwood in support of its motion for partial summary judgment, the witnesses presented facts to show that the meaning of Tariff 1 in the Power Contract, both at the time of its execution, and during the course of conduct of the parties demonstrated that up until NEP's sale of its generating facilities in 1998 and its termination of Tariff 1 service to its affiliates, effective February 25, 1998, that Tariff 1 was a cost-of-service regulated rate by the FERC which provided equal service to Norwood and NEP's affiliates, Mass Electric and Narragansett.

Norwood also presented an affidavit from Robert G. Towers, an expert witness, who confirmed that prior to the 1983 Decree and Order up to NEP's sale of its power facilities, NEP's Tariff 1 required rates regulated on a cost-of-service basis, and that Tariff 1 applied the same rate to Norwood as to NEP's affiliated retail distribution service distributors in Massachusetts, *i.e.*, Mass Electric and Narragansett in Rhode Island. Mr. Towers also stated that NEP's conversion of Norwood's contract from a cost-of-service to a fixed rate contract would subject Norwood to a price squeeze because the wholesale rate to Norwood was 20 percent higher than the power that was sold to NEP's affiliates at retail and that, further, the imposition by NEP of a "CTC" amounting to $7,388,000 per year would result in Norwood paying 40 percent higher wholesale rates than NEP and USGen/PG&E were providing wholesale power to its affiliates, including the fixed price standard offer service, which was denied to Norwood.

Norwood also submitted expert testimony by Dr. Robert Sinclair, an antitrust expert economist at J. W. Wilson & Associates, Inc., which concluded that the standard offer prices are a horizontal price fixing measure agreed to by power supply competitors in New England. The effect is that the:

> . . . fixed below-market prices for the initial years insure that the generation assets of the purchaser will not face serious competitive entry by rival suppliers, allowing it to secure substantial market share dominance in the nascent retail choice market. This also gives NEP's distribution company affiliates, Mass Electric and Narragansett, an anticompetitive edge over Norwood in competing for retention of existing and obtaining new customers in the important early years of open access in New England. The ability of NEP's affiliates, Mass Electric and Narragansett, to obtain wholesale power from NEP for resale to the retail customers at below-market prices gives them the ability to preclude competition for their existing customers and to unfairly attract new customers from other areas in New England.

Norwood's complaint alleged that after the four years the escalating fixed price for standard offer wholesale service would establish an anticompetitive high benchmark for wholesale power in New England, to the detriment of Norwood.

The district court dismissed Norwood's complaint in an order issued September 29, 1998, based on a Memorandum and Order dated September 28, 1998, the very same date as Norwood filed its motion for partial summary judgment. The district court dismissed Norwood's complaint solely on the basis of Rule 12(b)(6) stating that "the court needs only to address the issue of the 'filed rate' doctrine, which is dispositive." App.40a; 23 F.Supp. 2d at 115 . The district court also stated that ". . . the Court does not consider the affidavits submitted by parties . . . ." App. 33a; 23 F.Supp. 2d at 112. The district court denied Norwood's antitrust claims on the ground of the filed rate doctrine. App. 45a-53a; 23 F.Supp. at 117-119. [4]

The district court held that it lacked jurisdiction under the filed rate doctrine to adjudicate Norwood's breach of contract claims. App. 40a; 23 F. Supp. 2d at 115. The district court's further statement that the "breach of contract fails as a matter of law," App. 49a; 23 F.Supp. 2d at 119, when read in context, clearly was not independent of its basic conclusion that it dismissed the whole case solely under the filed rate doctrine.

The court of appeals below rejected the district court's decision that the filed rate doctrine barred Norwood's contract claim:

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[4] In a subsequent order issued October 2, 1998, the district court dismissed Norwood's motion for partial summary judgment as "moot." App. 52a.

> . . . We agree with Norwood that the filed rate doctrine does not bar Norwood's contract claim. . . .
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> * * *
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> . . . Under the amended tariff itself, *whether* a termination charge applies depends on *whether* there is a requirements contract in force. And FERC has at most approved only the generic terms of the amended tariff; it has not determined whether Norwood's prior obligation to buy from New England Power was vitiated by a breach on the part of New England Power, *New England Power Co.*, 84 F.E.R.C. ¶61,176, at 61,920 (1998), or some other means.

App. 11a-12a; 202 F.3d at 416. The court of appeals, despite the district court's ruling that its entire decision was based on the filed rate doctrine, and that it had not considered any affidavits by the parties on the merits of the dispute, construed the district court's decision as having "in the alternative" denied Norwood's breach of contract claims, under Federal Rule of Civil Procedure 12(b)(6), as a matter of law.

In doing so, however, the court of appeals resolved factual issues contrary to the allegations of the complaint and Norwood's affidavits.

Norwood, in its appeal to the court of appeals below, argued that the district court had erred in dismissing Norwood's breach of contract complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure without discovery or Rule 56 proceedings because its rulings involved resolving factual issues as to the course of conduct of the parties and frustration of the basic purpose of the Power Contract inconsistent with the factual allegations of the complaint, and Norwood's affidavits in support of its motion for partial summary judgment. The court of appeals conceded that "extrinsic evidence can be admitted to show ambiguity [in the meaning of "Tariff 1" used in the Power Contract] and to resolve it and that:

> . . . Under certain circumstances, the mere failure of underlying assumptions can release a party from a contract - one specific doctrine is frustration of purpose ...

App. 13a; 202 F.3d at 417. However, the court of appeals dismissed the complaint under Rule 12(b)(6) without permitting any discovery by Norwood, Rule 56 proceeding, or a jury trial as requested by Norwood.

The court of appeals affirmed the district court's dismissal of Norwood's antitrust claims under Sections 1 and 2 of the Sherman Act under Rule 12(b)(6) on the basis of the filed rate doctrine.[5] As to Norwood's claims of price fixing under Section 1 of the Sherman Act and price squeeze under Section 2 of the Sherman Act, the court of appeals admitted that the decisions by a number of other circuits, as well as the antitrust law treatise of Areeda and Hovenkamp conflict with its decision. App. 15a; 202 F.3d at 418. The court of appeals concluded that:

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[5] The court of appeals reversed and remanded the district court's dismissal of Norwood's antitrust claims under Section 7 of the Clayton Act. App 22a-28a; 202 F.3d at 421-424.

> . . . lower courts are divided and confused and there are more than two sides.

App. 18a-19a; 202 F.3d at 420.

The court of appeals also ruled that the "antitrust savings clause" of the Energy Policy Act of 1992 relating to amendments of the Federal Power Act, on which the FERC relied in issuing its open access rule, Order 888, does not preclude the grant of antitrust immunity under the filed rate doctrine despite its clear language. App. 19a-20a; 202 F.3d at 420.

The court of appeals concluded that the "law on the filed rate doctrine is extremely creaky." App. 20a; 202 F.3d at 420. The court of appeals ruled that Norwood could not litigate its antitrust claims for declaratory and injunctive relief despite this Court's approval of such relief in its *Square D* decision. App. 18a; 202 F.3d at 419.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Dismissing Norwood's Complaint For Price Fixing In Violation Of Section 1 Of The Sherman Act By Private Power Suppliers Directly Affecting The Availability And Price Of Competitive Power Supplies And Division Of Retail Territories Under Open Access in New England Based on The Filed Rate Doctrine, Which Poses Novel Important Issues As to the Administration of the Federal Antitrust Laws and the Federal Power Act Which Should Be Reviewed By This Court

The facts of this case demonstrate a case of illegal price fixing in violation of Section 1 of the Sherman Act.

On September 30, 1996, NEP entered into an agreement with PG&E's subsidiary (USGen) and other power suppliers in New England to charge fixed prices for wholesale service to its affiliates to be resold to their retail customers, designated as standard offer prices for up to 7 years in the future for Mass. Electric and 12 years for Narragansett.

Subsequently, the FERC also confirmed that it had not reviewed the wholesale standard offer prices under the just and reasonable standard of the Federal Power Act requiring a cost-of-service basis therefor on the ground that no review was needed for prices negotiated by private parties as "market-based rates." *New England Power Co.*, 82 FERC ¶61,179, 61,665 (1998).

NEP's agreement with its affiliates and other power suppliers for standard offer service constitutes an illegal *per se* price fixing scheme in violation of Section 1 of the Sherman Act. *Arizona v. The Maricopa County Medical Society*, 457 U.S. 332, 344-48 (1982); *Catalano, Inc. v. The Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Motives behind the agreement are irrelevant. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.")[6] The facts alleged in the complaint establish all the elements of the offense.

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[6] *Socony-Vacuum Oil Co.* also held that proof of monopoly power was not required to establish a violation under Section 1 for price-fixing. 310 U.S. at 223.

Norwood, which is not a party to the price fixing agreement, has standing to establish that the concerted action by NEP and other power suppliers constitutes an anticompetitive price-fixing conspiracy that harms Norwood as a competitor in the retail electric market and a buyer in the wholesale market. *See Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (terminated dealer entitled to recover).

The court of appeals below held that the district court erred in summarily dismissing Norwood's complaint under the filed rate doctrine as to Count I alleging a breach of the earlier antitrust Decree and Order of April 12, 1983 approved by the Power Contract between NEP and Norwood [7] and, as to Norwood's antitrust claims against the defendants, NEP/NEES and PG&E, under Section 7 of the Clayton Act.[8] Inconsistently, the court of appeals held that the district court lacked jurisdiction under the filed rate doctrine to adjudicate Norwood's claims for violations of Section 1 of the Sherman Act for price fixing [9] and Section 2 of the Sherman Act for price squeeze. [10]

The court of appeals dismissed Norwood's Section 1 Sherman Act claim solely on the ground that it "does not constitute horizontal price fixing", but "is an ordinary vertical transaction" and "did not set rates for other wholesale suppliers." 202 F.3d at 421. But this directly contradicts the allegations of the complaint and Norwood's affidavits,[11] which demonstrated that the September 30, 1996 Agreement included NEP (a major New England power producer) and USGen (a competitive power supplier), both horizontal power suppliers who set fixed prices for wholesale power sales. PG&E/USGen subsequently, as a horizontal power purchaser, acquired the right to supply this service to NEP's affiliates. Throughout, NEP treated the September 30, 1996 Agreement as a wholesale transaction to be filed only at the FERC, not subject to the jurisdiction of the respective state public service commissions.[12]

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[7] App. 11a; 202 F.3d at 416.

[8] App. 22a-23a; 202 F.3d at 422.

[9] App. 22a; 202 F.3d at 421.

[10] App. 15a-19a; 202 F.3d at 418-420.

The court of appeals' conclusion below that the fixed standard offer prices filed by NEP at FERC are granted immunity from Norwood's complaint under the Federal antitrust laws, conflicts with two decisions by this Court and six different circuits based thereon.

In *California v. FPC*, 369 U.S. 482 (1962), this Court held that approval of an acquisition of assets of a natural gas company by the Federal Power Commission pursuant to Section 7 of the Natural Gas Act (companion to Section 203 of the Federal Power Act) would be no bar to an antitrust suit. The Court held that:

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[11] *See* complaint §50 and Affidavit of Dr. Sinclair, *supra*, at 8-9.

[12] The state public service commissions have no jurisdiction to review or adjudicate the wholesale fixed standard offer prices, which in turn govern the retail prices charged by Mass. Electric and Narragansett.

> Here . . . while "antitrust considerations" are relevant to the issue of "public convenience and necessity" . . . there is no "pervasive" regulatory scheme including the antitrust laws that has been entrusted to the commission.

369 U.S. at 485. The Court distinguished the Interstate Commerce Act:

> . . . Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as §5(11) of that Act specifically provides that the carrier involved "shall be and they are hereby relieved from the operation of the antitrust laws . . . ."
>
> There is no comparable position other under the Natural Gas Act. . . .

369 U.S. 485-6. In *California*, there were actual filings before the commission indistinguishable from those of the present case.

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court reaffirmed its holding in *California*, 410 U.S. at 373, and applied a similar ruling to the Federal Power Act (FPA). The Court held that the commission's authority to consider filings under the FPA did not grant antitrust immunity to the entities making such filings:

> . . . Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action is "necessary or

> appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative.
>
> * * *
>
> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not by regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. . . .

Otter Tail, 410 U.S. at 373-374. The Court noted that the FPC had issued an order requiring such an interconnection. 410 U.S. 37. Such an order is indistinguishable from the orders involved in this case. In *Square D Co. v. Niagara Frontier Tariff Bur.*, 476 U.S. 409 (1986), this Court addressed only the "sometimes conflicting policies of the antitrust laws and the Interstate Commerce Act, 49 U.S.C. §10101 at *seq.*" 476 U.S. at 411. The Court noted that an amendment to that Act exempted filed rates from the antitrust laws if approved by the ICC. While the Court found the antitrust claims of the plaintiffs went beyond the immunity limits in the ICC Act, it ruled they were within the limits of *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922) involving the relationship between the ICC Act and the antitrust laws, which Congress "did not see fit to change when Congress carefully re-examined this area of the law in 1980." 476 U.S. at 420.

Four of the six circuits directly involved cases arising under the Federal Power Act have held no antitrust immunity exists for rates filed by a public utility at FERC even when based on the just and reasonable cost-of- service standard under Section 205 or 206 of the Federal Power Act and claims under Sections 1 and 2 of the Sherman Act. *Town of Concord v. Boston Edison Company*, 915 F.2d 17, 21-22 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) [13]; *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1177-1179 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) (filed rate doctrine of *Keogh* and *Arkansas-Louisiana Gas Co. v. Hall*, does not bar price squeeze claims for treble damages under Section 2 of the Sherman Act); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 919, 921, 929 (2d Cir. 1981) ("In sum . . . an anticompetitive practice embodied in a tariff may violate the antitrust laws if it . . . impacts upon competitors as opposed to customers . . ."); *City of Mishawaka v. Indiana and Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) (price squeeze claim under Section 2 of the Sherman Act based on wholesale rate filed at FERC is subject to adjudication in Federal District Court despite FERC jurisdiction under the Federal Power Act to adjudicate such claims). [14]

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[13] *See also, Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 948 (1st Cir. 1993) (citing *Concord*, 915 F.2d 17 at 22 with approval for principle that, "indiscriminate incorporation of antitrust policy into utility regulation undercuts the very objectives the antitrust laws were designed to secure.")

[14] The Supreme Court and two other circuits have confirmed similar principles relating to filings approved by other regulatory agencies. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (state commission approval of light exchange program did not immunize utility from the antitrust laws); *Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 943-948 (9th Cir. 1996)

The court of appeals below, while not applying these cases, stated that the "law on the filed rate doctrine is extremely creaky" and that "the lower courts are both divided and confused in their discussion of this issue; [filed rate doctrine does not block a claim brought by a plaintiff who is a competitor of the defendant] and there are more than two sides." App. 20a, 18a-20a; 202 F.3d at 420.

The conclusion that the filed rate doctrine does not apply is especially applicable here where the standard offer prices have never been reviewed by FERC under a cost-of-service basis under the Federal Power Act. FERC has confirmed that it did not review those rates under its cost-of-service standards under the FPA, because the rates were established on a negotiated basis as market-based rates under the FERC's new deregulation regime under Order 888. *New England Power Co.*, 83 FERC ¶61,174, 61,665 (1998).

Antitrust commentators are in agreement that the antitrust laws apply to deregulated markets. As explained by noted authors P. Areeda and H. Hovenkamp, the pervasiveness of regulation determines antitrust jurisdiction. *Antitrust Law* ¶240 at 16 (1997). In *Otter Tail*, the court found no apparent antitrust immunity despite pervasive regulation under the FPA. "Today, regulation of electric utilities is even less pervasive then it was at the time of *Otter Tail.*" *Antitrust Law*, ¶251 at 155 (1997). As a result, Areeda and Hovenkamp argue that "the effect of deregulation is to enlarge the domain of antitrust by

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(Keogh (filed rate doctrine) not a bar to rate-based actions brought by competitors against regulated utilities); and *In re Lower Lake Erie Iron Ore Antitrust Lit. v. Baltimore & Ohio Railroad Co., Inc.*, 998 F.2d 1144 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1021 (1993) (an anticompetitive practice embodied in a tariff may violate the antitrust laws if it impacts upon competitors as opposed to customers).

removing or narrowing antitrust immunities that existed before." *Id.*, ¶241 at 29-30. Indeed, the authors observed that, while regulation has not been eliminated "abolition of supervised rates necessarily ousts the filed rate doctrine, which denied customers antitrust damages based on allegedly excessive rates . . ." *Id.*, ¶241 at 30. *See also,* Pierce, Richard J., *The Antitrust Implications of Energy Restructuring*, Natural Resources and Environment, Vol. 12, No. 4 (Spring 1998) 269 at pp. 274-75:

> . . . In particular, if a federal agency has announced that a firm is free to set its own prices as part of a transition to reliance on market forces to govern the provision of some previously regulated good or service, antitrust law will be held to apply to the firm's behavior with respect to the sale of that good or service. Thus, if FERC allows a owner of generating capacity to engage in wholesales of electricity at market-based rates, all of its conduct in making such sales will be subject to the antitrust laws. [Emphasis added.]

Because of the importance of this issue of law to the resolution of the rights of all parties under new open access wholesale transactions as to whether the basic long-standing principles of Sections 1 and 2 of the Sherman Act to protect competition apply, poses a matter warranting the grant of the writ in this case.

II. The District Court Erred In Dismissing Norwood's Claims For A Price Squeeze Under Section 2 Of The Sherman Act Based On The Filed Rate Doctrine

Norwood's complaint in the district court alleged that NEP had violated Section 2 of the Sherman Act by subjecting Norwood to a price squeeze based on (1) NEP's conversion of Norwood's cost-of-service contract to a fixed rate contract for the future 20 percent higher than the unregulated wholesale prices then being made available to NEP's affiliates in competition with Norwood; (2) imposing a stranded cost charge on Norwood that was twice as high as the stranded cost to be paid by NEP's affiliates and (3) denying Norwood the below market standard offer wholesale rates substantially lower than the rates available to Norwood.

As noted above,[15] the decision by the court of appeals below dismissing Norwood's price squeeze claims under Section 2 of the Sherman Act on the basis of the filed rate doctrine conflicted with decisions in four other circuit courts, as well as *Town of Concord v. Boston Edison Co.*, which decided a price squeeze on the merits. 915 F.2d at 21-22.

All of these cases hold that there was no immunity under the filed rate doctrine as to price squeeze claims under Section 2 of the Sherman Act, even though the utility had filed the cost-of-service based rates creating the price squeeze at the Federal Energy Regulatory Commission.

Secondly, the court of appeals' improper attempt to distinguish the price squeeze cases on the ground that "the monopoly supplier was subject to Federal regulation at the wholesale level but not at the retail level because FERC regulates both of the tariffs in question" is not applicable. App. 16a; 202 F.3d at 418. The court's distinction completely fails in the present case, because the FERC itself concedes that its regulatory power does not cover both levels involved. The Commission ordered the conversion of Norwood's rate from a cost of service to a fixed price, while conceding that NEP and its affiliates were not subject to such restrictions but could negotiate market-based rates not governed by such criteria. As to the CTC rate, FERC admits that it applied a different regulatory standard to Norwood than that filed by NEP for its affiliates. Finally, the standard offer which the court construes as relating to retail rates to customers as "an ordinary vertical transaction," which was denied to Norwood, clearly meets all of the cases denying filed rate doctrine immunity in price squeeze situations.

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[15] *Supra*, 19-20.

Because of the admitted conflict between the court's decision below summarily denying jurisdiction of the Federal Court to consider Norwood's price squeeze claims under Section 2 of the Sherman Act, on which four separate circuits have ruled to the contrary and related decisions from two other circuits denying applicability of the filed rate doctrine[16] where rights of competitors, as distinct from customers, are concerned, important issues in the administration of the Federal antitrust laws warrant the granting of *certiorari*.

III. Congress' Clear Declaration In The Energy Policy Act of 1992 Amending the Federal Power Act In The "Antitrust Savings Clause" That The FERC Has No Authority Under The Federal Power Act To Adjudicate The Federal Antitrust Laws, Has Been Erroneously Negated By The Court Of Appeals Below

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[16] See, *supra*, 20 and n14.

In 1992, when Congress enacted the Energy Policy Act to amend the Federal Power Act to grant FERC additional authority to order wheeling to facilitate open access, it expressly provided that its enactment does not disturb the authority of the Federal District Courts to enforce the antitrust laws:

> (e) Savings Provisions
>
> (2) Sections 824i, 824j, 824l, 824m of this title, and this section [824k], shall not be construed to modify, impair or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of Title 15, except that such term includes section 45 of Title 15 to the extent that such section relates to unfair methods of competition.

16 U.S.C. § 824k(e)(2) (1997). [17]

The purpose of the Energy Policy Act was to amend the Federal Power Act to grant to the FERC additional authority under the Federal Power Act in order to undertake wholesale open access. The House Report by the Judiciary Committee specifically requested inclusion of the "antitrust savings clause" regarding the antitrust laws:

> The purpose of the antitrust amendment is to protect the integrity of antitrust jurisprudence and enforcement, while fully preserving FERC's responsibility to weigh

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[17] Section 12 of Title 15 expressly includes Sections 1 and 2 of the Sherman Act of 1890, 15 U.S.C. §12 (a) (1997).

> antitrust-related concerns in deciding whether to order the wheeling of power between utilities. This amendment deletes an explicit statutory reference to "the antitrust laws" in FERC's new responsibilities, while preserving statutory references to the antitrust-related goals of promoting competition and stopping discriminatory practices. *The amendment also clarifies the antitrust savings clause to insure that the antitrust laws remain fully available to public enforcement officials and private parties.*

H. Rep. No. 102-474 (VII), 102 Cong. 2nd Sess. 4, *reprinted in* 1992, U.S. Code Cong. & Ad. News 2271 at 2272; emphasis added..

Later in the report, the Committee cited with approval *Otter Tail Power Co. v. United States*, 410 U.S. 360 (1973) as "one of the leading 'essential facilities doctrine' antitrust decisions" which "held a refusal to wheel to violate the Sherman Act." *Id.* at 2273. The Report rejected language allowing FERC to adjudicate the Federal antitrust laws and made it clear that FERC, under the amendment, had no authority to adjudicate or supersede the Federal antitrust laws:

> . . . the Committee's concern is that an *explicit* grant of statutory authority to provide relief based on the antitrust laws themselves could well result in a FERC-made body of antitrust "precedent" that would improperly influence, confuse, or segment the continuous development of antitrust jurisprudence in and by the courts.

Id. at 2274; emphasis in original.

The court of appeals below sought to distinguish the statute on the ground that the 1992 Act "only refers to limited sections of the Federal Power Act, notably *not* including those that establish the rate filing requirements, 16 U.S.C. §824d, and to which the filed rate doctrine relates." App. 19a-20a; 202 F.3d at 420. This is erroneous, however, because the new §824k(a) expressly provided for "rates, charges, terms and conditions for wholesale transmission services" which provided the basis for the stranded costs subsequently authorized under the FERC regulations under Order 888. App. 56a. Also, the court's distinction disregards all of the then-existing judicial precedents relating to the Federal Power Act from this Court's decisions in *California* and *Otter Tail* to the decisions by six circuit courts [18] denying any immunity from the Federal antitrust laws in filings under Sections 205 and 206 of the Federal Power Act for antitrust immunity from a price squeeze under Section 2 of the Sherman Act.

IV. The Court Of Appeals Clearly Erred In Misapplying This Court's Holding In *Square D Company* In Dismissing Under the Filed Rate Doctrine Norwood's Explicit Claims For Declaratory And Injunctive Relief Under The Federal Antitrust Laws

The court of appeals below erred in dismissing Norwood's complaint for declaratory and injunctive relief under Sections 1 and 2 of the Sherman Act based on the filed rate doctrine. This Court has held that the doctrine does not apply to claims for declaratory or injunctive relief. Norwood's complaint seeks declaratory relief (recission) and injunctive relief. In *Square D Company v. Niagara Frontier Tariff Bur.*, 476 U.S. 409, 422 n.28 (1987), this Court expressly confirmed that the filed rate doctrine grants no immunity from the Federal antitrust laws with respect to declaratory and injunctive relief.

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[18] See, supra, at 20 and n14.

The court of appeals improperly sought to distinguish those rulings on the ground that "here, any meaningful relief as to the price squeeze would require the alteration of tariffs." App. 18a; 202 F.3d at 420. Declaratory and injunctive relief could bar a party violating the Federal antitrust laws from continuing its anticompetitive conduct. *Square D Co. v. Niagara Frontier Tariff Bur.*, 760 F.2d 347 at 1358, 1364-1366 (2d Cir. 1985) (affirmed in *Square D*; see 27, *supra*).

V. The Court of Appeals Erred in Summarily Dismissing Count I of Norwood's Complaint That NEP Had Breached Its 1983 Power Contract With Norwood Under Rule 12(b)(6) Of The Federal Rules of Civil Procedure

The court of appeals erred in applying Rule 12(b(6) of the Federal Rules of Civil Procedure, App. 57a-58a, in summarily dismissing Norwood's complaint for breach of contract against NEP.

This Court has held that a complaint should not be dismissed unless it appears that plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh'g denied*, 396 U.S. 869 (1969). Ordinarily, a motion to dismiss is disfavored and should be resolved in favor of the plaintiff. *Conley v. Gibson*, 353 U.S. 41 (1957). The issue is whether the plaintiff is entitled to offer evidence, not the sufficiency of proof.

Scherrer v. Rhoads, 415 U.S. 232 (1974).

A motion to dismiss under Rule 12(b)(6) must accept the facts alleged in the complaint as true, and must be reviewed in the light most favorable to the plaintiff. *Boone v. Ferguson*, 890 F.2d 11, 12 (7th Cir. 1989) (J. Posner).

The court of appeals erred in not applying these principles by resolving factual issues contrary to the allegations of the complaint, as well as the affidavits of Norwood's witnesses, without further discovery and trial proceedings.

Norwood's second amended complaint alleged the following:

> 36. NEP's divestiture proposal constitutes a clear breach of the existing power supply contract with Norwood, approved by this Court's Decree and Order in Civil Action No. 74-4104-T. That agreement requires NEP to provide all of Norwood's power requirements at wholesale rates regulated by FERC, based on prudently incurred historic costs under Tariff 1, which provides equal wholesale rates to Norwood as NEP was providing to its distributor affiliates, Mass. Electric and Narragansett. . . . NEP's voluntary commitment to divest itself of its generating facilities, including its purchase power contracts, and the termination of Tariff 1 service by NEP to Mass. Electric and Narragansett, frustrates and negates NEP's ability to perform its contract with Norwood, which required that the charges to Norwood be based on NEP's embedded cost of service of its generating units and power

> contracts, as determined by FERC to be just and reasonable, under Tariff 1 wherein Norwood would pay equal rates with NEP's affiliates. ...NEP has unilaterally changed its contract with Norwood from a 20 year cost plus rate (cost-of-service) to a ten year fixed rate based on pre-divestiture costs, not tied to equality with NEP's affiliates.

In further support of the allegations of the complaint, Norwood submitted affidavits by Malcolm McDonald, the Superintendent of Utilities, and its expert, Robert Towers, establishing that the background and course of conduct under the Contract demonstrated that the phrase "Tariff 1" in the contract evidenced that Tariff 1 was a cost of service rate provided equally to NEP's affiliates and Norwood, up until the time of NEP's divestiture of its power facilities in 1998.

The court of appeals below conceded that "extrinsic evidence can be admitted to show ambiguity and to resolve it, *see Donoghue v. IBC USA* (publications), *Inc.*, 70 F.3d 206, 215 (1st Cir. 1995)." App. 13a; 202 F.3d at 417. [19] The allegations of the complaint and Norwood's affidavits made clear allegations that the meaning of "Tariff 1" used in the Power Contract based on the background and context in which the contract was entered and the course of conduct under the contract, made it clear that Tariff 1 was in fact based on a regulated cost of service by the FERC. The fact that NEP itself in 1998 terminated Tariff 1 service to its own affiliates, Mass. Electric and Narragansett, in shifting to market-based rates was further evidence supporting the meaning of "Tariff 1" as used in the Power Contract. The conversion by NEP of Norwood's cost of service rate under Tariff 1 to a fixed price rate, was contrary to the allegations of the complaint and the affidavits showing the background, understanding, and historic interpretation of "Tariff 1" employed by the parties from 1983, up until the time of divestiture.

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[19] It is established law in Massachusetts that the background context in which a contract is entered are required to be considered to determine the intent of the parties. *SAPC v. Lotus Development Corp.*, 912 F.2d 360, 361 n.2 (1st Cir. 1990) (parol evidence ruled does not preclude consideration of background facts that explain the context in which an agreement was made).

The court of appeal's conclusion that "since New England Power has continued to offer Norwood the gist of what it was a promised: a cost-based, long-term supply of electricity, subject to FERC regulation", App. 14a; 202 F.3d at 417, directly conflicts with the allegations of the complaint and Norwood's affidavits and precludes dismissal under Rule 12(b)(6). The conversion of Norwood's contract from a cost-of-service based rate to a fixed rate not based on NEP's costs represent a disputed factual issue involving a fundamental alteration and change of Norwood's contract, which warranted further proceedings.

Secondly, Norwood's complaint clearly alleged that NEP's divestiture of its generating facilities including its purchase power contracts, and the termination of Tariff 1 service by NEP to Mass. Electric and Narragansett "frustrates and negates NEP's ability to perform its contract with Norwood." The Court admits that:

> Under certain circumstances, the mere failure of underlying assumptions can release a party from a contract - one specific doctrine is frustration of purpose - but it would take a developed line of reasoning, legal precedent and specific facts showing the centrality of the

> assumptions and the extent to which the assumption makes it unjust to hold the unhappy party to its own premises. *See, generally*, II Farnsworth, *Farnsworth on Contracts*, ch. 9 (2d ed 1998.

App. 18a; 202 F.3d at 417. But since Norwood raised the issue of frustration of purpose in its complaint, it was clear error for the court under Rule 12(b)(6) to deny Norwood the opportunity of discovery, Rule 56 proceedings, and a jury trial, to establish this issue of fact. Here again, the court improperly dismissed the complaint under Rule 12(b)(6) (App. 4a), which denied Norwood due process of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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May 30, 2000

APPENDIX

NORWOOD, MASSACHUSETTS, Plaintiff, Appellant,
v.
NEW ENGLAND POWER COMPANY,
NEW ENGLAND ELECTRIC SYSTEM (NEES),
PACIFIC GAS & ELECTRIC COMPANY,
and PG&E CORPORATION, Defendants, Appellees.

No. 99-1047

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

202 F.3d 408; 2000 U.S. App. LEXIS 1560;
2000-1 Trade Cas. (CCH) P72,792;
45 Fed. R. Serv. 3d (Callaghan) 1029

February 2, 2000, Decided

SUBSEQUENT HISTORY: As Amended March 15, 2000.

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS.
[Hon. Patti B. Saris, U.S. District Judge].

DISPOSITION: District court's judgment dismissing complaint on the merits affirmed as to all claims other than that under section 7 of the Clayton Act; section 7 claim remanded to district court for further proceedings consistent with this decision.

CORE TERMS: wholesale, customer, tariff, termination, affiliate, antitrust, generating, competitor, purchaser, retail, squeeze, Clayton Act, offering, regulated, tariffed, notice, transmission, settlement, long-term, decree, doubtful, merger, challenging, Sherman Act, regulation, companion, retailers, settlement agreement, motion to dismiss, notice of appeal.

COUNSEL: Charles F. Wheatley, Jr. with whom Wheatley & Ranquist, Kenneth M. Barna, Alan K. Posner and Rubin & Rudman were on brief for plaintiff.

Edward Berlin with whom Robert V. Zener, Swidler Berlin Shereff Friedman, LLP, John F. Sherman, III, Associate General Counsel, The NEES Companies, David H. Erichsen, Peter A. Spaeth and Hale and Dorr LLP were on brief for appellees New England Power Company and New England Electric System (NEES).

Steven W. Phillips with whom Richard M. Brunell, Robert L. Bocchino, Jr. and Foley, Hoag & Eliot LLP were on brief for appellees Pacific Gas & Electric Company and PG&E Corporation.

JUDGES: Before Boudin, Stahl and Lipez, Circuit Judges.

OPINION BY: BOUDIN

OPINION: Norwood, Massachusetts ("Norwood") filed a complaint against New England Power Company ("New England Power") and others alleging antitrust violations and breach of contract. The district court dismissed the complaint and Norwood now appeals. This decision assumes a familiarity with our decision today in Nos. 98-1847 et al., Town of Norwood v. FERC, resolving petitions filed by Norwood and another challenging orders of the Federal Energy Regulatory Commission ("FERC") in related administrative proceedings.

I. THE HISTORY

To summarize the facts, [1] New England Power is a major wholesaler of electric power in New England, and Norwood owns and operates a municipal utility that distributes retail electric power to residents and businesses in the town. For some years Norwood purchased its power at wholesale from Boston Edison Company, but in the 1970s Norwood sought instead to purchase its power from New England Power and have that power delivered over the intercity transmission network of Boston Edison. Boston Edison and New England Power resisted, but the matter was resolved by settlement after Norwood brought an antitrust suit against them.

The settlements, arrived at in 1980 and 1983, included the agreement of Boston Edison to "wheel" power for Norwood over Boston Edison's transmission network and the agreement of New England Power to furnish all of Norwood's requirements for electricity through October 31, 1998, under New England Power's FERC Tariff No. 1 "as [it] may be amended from time to time." Under that tariff, New England Power then supplied power to its own retail affiliates such as Massachusetts Electric Company ("Mass Electric"). The decree in the antitrust case directed that the annexed settlement agreement and power contract were "approved as a settlement of this case and shall be carried out by both parties."

The parties amended the power contract in 1989 to give

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[1] We rely primarily on allegations in the complaint, documents attached to it, see *Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998)*, and matters of public record, see *Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993)*, but also take judicial notice of the record in our companion case and in the underlying FERC proceedings. See *McKinney v. Waterman Steamship Corp., 925 F.2d 1, 5 (1st Cir. 1991)*.

Norwood an option to extend the minimum term, and it then exercised the option to extend the contract to at least October 31, 2008. [2] Each side could terminate on seven years' advance notice. New England Power had somewhat similar requirements contracts with its own affiliates and with other independent retailers embodying similar lengthy periods of notice before termination. The function of such lengthy notice periods is to permit stability for each side; the wholesaler, for example, ordinarily makes investments or other arrangements to assure a stable supply of power either by generation, purchase contracts of its own, or both. See generally *Kentucky Utils. Co. v. FERC, 766 F.2d 239, 243 (6th Cir. 1985).*

Beginning in December 1996, New England Power made a set of regulatory filings to restructure itself and to revise its existing tariffs for wholesale power sales in Massachusetts and Rhode Island. These filings, described in more detail in our companion decision, had several aims: approval by FERC of the sale of New England Power's non-nuclear generating facilities to a west coast utility; the release of New England Power affiliates like Mass Electric from their long-term obligations to purchase their power from New England Power; and the restructuring of New England Power's wholesale rates to affiliates and interested purchasers to facilitate customer choice and market-based pricing at both the wholesale and retail level.

To accommodate policies of both the Massachusetts and Rhode Island state utility commissions, New England Power also proposed a temporary, non-cost-based wholesale offering called "standard offer service." This temporary offering was to provide power at predetermined rates, increasing rapidly over a multi-year period, [3] to those retailers required by the states to offer counterpart retail standard offer rates to their own customers; the states were introducing competition at the retail level and wanted retail purchasers to have an initial low-rate offering as a backup while competitive sources of supply developed for them, e.g., In re Massachusetts Elec. Co., Mass. D.P.U. 96-25, at 23-25 (Feb. 26, 1997); see also Mass. Gen. Laws ch. 164, § 1B(b); R.T. Gen. Laws § 39-1-27.3. Such retail sellers include Mass Electric and other investor-owned retailers but not municipalities like Norwood, which have no obligation to allow competitive access to their customers. See Mass. Gen. Laws ch. 164, § 47A.

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[2] Norwood said in its second amended complaint that it extended the original contract for ten years to October 31, 2008, but then "elected to withdraw [the extension]"; in various later submissions to the district court it said that the extension was not effective. These claims of withdrawal or ineffectiveness were mentioned but not seriously developed in Norwood's brief, and we decline to address them. *Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1113 (1st Cir. 1993).*

The prospective sale by New England Power of its low-cost hydroelectric and fossil generating facilities posed a potential problem for existing requirements-contract purchasers like Norwood, since New England Power's existing tariff rates (filed with FERC and incorporated by reference into power contracts) were normally amended to provide for price increases as New England Power's costs went up. To meet this objection, New England Power proposed to implement a rate freeze that would prevent increases in wholesale rates for its requirements-contract customers, including Norwood, during the term of their agreements.

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[3] For Mass Electric, the rate goes from 3.2 cents per kilowatt hour in 1998 to 5.1 cents per kilowatt hour in 2004. The low starting point and rapid elevation were intended to give customers protection at the start but then to encourage their migration to the competitive market.

While the initial filings of various proposals were under consideration by FERC, Norwood, on April 14, 1997, filed the present suit in the district court; this complaint, as later amended, named as defendants New England Power, its parent New England Electric System, and two companies that were part of the California-based parent utility system (collectively "PG&E") whose subsidiary ("USGenNE") was to acquire New England Power's non-nuclear generating facilities in New England. Between the original filing of the complaint and its later substantial revision through two amendments, additional events took place that are important to the present action.

First, in the FERC proceedings, the Commission ultimately approved a settlement agreement permitting (on payment of contract termination charges) early termination of requirements contracts by the affiliates of New England Power, *New England Power Co., 81 F.E.R.C. P61,281 (1997),* reh'g *denied*, 83 F.E.R.C. P61,265 (1998); approved the offering of the new backup wholesale standard offer service, id.; approved the transfer of generating facilities and associated contracts to USGenNE, *New England Power Co., 82 F.E.R.C. P61,179 (1998),* reh'g denied, *83 F.E.R.C. P61,275 (1998);* and agreed to the FERC Tariff No. 1 rate freeze that would prevent post-divestiture rate increases to purchasers who chose to avoid the termination charge by continuing as wholesale customers of New England Power under their existing contracts, id.

Second, regarding itself as disadvantaged by the wholesale standard offer service made available to New England Power's retail affiliates--whom Norwood regards as retail competitors--Norwood notified New England Power on March 4, 1998, that it was switching to a different wholesale supplier, Northeast Utilities; a tariff and agreement to that effect were filed with FERC and have gone into effect. Two weeks later, on March 18, 1998, New England Power filed a revised FERC Tariff No. 1 permitting its non-settling wholesale customers like Norwood to terminate their contracts early, and on only 30 days' notice, with the condition that the customers pay a large contract termination charge. The charge was calculated based on the revenues that New England Power would have expected to collect had a customer continued to pay the now-frozen tariff rate through the contract term, less the expected costs avoided by not providing service.

As finally amended in April 1998, Norwood's complaint made a number of separate claims. In count 1, it charged that New England Power had violated the prior 1983 antitrust decree and power contract by divesting itself of its generating facilities, shifting Norwood to a fixed rate based on pre-divestiture costs, and proposing to serve its own affiliates on a quite different basis than the fixed rate (namely, market-based rates subject to the availability of the initially low-cost wholesale standard offer service).

The remaining three counts in Norwood's second amended complaint charged violations of sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1*-2, and sections 3 and 7 of the Clayton Act, *15 U.S.C. §§ 14,* 18. The company attacked the contract termination charge imposed on Norwood under the revised FERC No. 1 Tariff as an illegal restraint of trade, an unlawful tying arrangement, and, in combination with the standard offer rates, an illegal price squeeze; it alleged a conspiracy to fix prices in the wholesale market; and it alleged a lessening of competition from the transfer of New England Power's non-nuclear generating assets to USGenNE.

After a motion by Norwood for partial summary judgment and motions to dismiss by the defendants, the district court on September 28, 1998, entered a decision dismissing the complaint under Fed. R. Civ. P. 12(b)(6). *Town of Norwood v. New England Power Co., 23 F. Supp. 2d 109 (D. Mass. 1998).* In doing so, the court considered the allegations in the complaint, documents attached to it, and matters of public record including FERC decisions. In substance, the court rested its decision on FERC's scrutiny of the same transactions, the so-called filed rate doctrine, and the terms of the settlement agreement and power contract between Norwood and New England Power.

I. DISCUSSION

1. At the threshold of this appeal is a substantial claim by New England Power that a procedural error by Norwood deprives us of jurisdiction to consider Norwood's main claims. After the district court entered its decision and judgment, Norwood filed a timely motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment; after this was denied, it filed a notice of appeal in this court challenging the denial. Norwood then filed a motion under Fed. R. Civ. P. 60(b) for relief from the judgment on grounds of newly discovered evidence and, in the alternative, moved for a second time under Fed. R. Civ. P. 59(e) to alter or amend the judgment.

The district court denied both of the new motions, and Norwood then filed an amended notice of appeal challenging the denial of its post-judgment motions; but Norwood did not mention in either its original or amended notice of appeal the district court's original decision and judgment. New England Power points out that Norwood's brief is directed almost entirely to the original decision and judgment from which it says that Norwood did not appeal.

The law on this issue is less clear than the cases claim it to be. On the one hand, courts often say that a notice of appeal that names only a post-judgment order as the subject of the appeal does not bring the original judgment before the appellate court. E.g., *Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991).* On the other hand, because in such cases the failure to name the underlying judgment is usually a slip of the pen and rarely causes any prejudice to the other side, courts then go through endless contortions to rescue the technically defaulted portion of the appeal. See 11 Wright, Miller & Kane, Federal Practice and Procedure § 2818, at 192-93 & n.11 (2d ed. 1995) (collecting cases).

Sometimes this resurrection can be justified in common-sense terms where, for example, the caption of the notice refers to a post-judgment order but the body also refers to the underlying judgment, see *In re San Juan Dupont Plaza Hotel Fire Litig., 45 F.3d 564, 567 (1st Cir. 1995)*, or where the appellant previously filed a premature notice of appeal challenging the underlying judgment, ineffective by itself but illustrating an intent to attack the judgment, see *Foman v. Davis, 371 U.S. 178, 180-82, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 839-40 (1st Cir. 1993)*, cert. denied, *511 U.S. 1018, 128 L. Ed. 2d 72, 114 S. Ct. 1398 (1994)*. The latter is what occurred in Foman, relied upon by Norwood in this case. But Norwood did not file a premature notice of appeal designating the original judgment. Cf. *Gottesman v. INS, 33 F.3d 383, 388 (4th Cir. 1994)*.

However, Norwood's timely first motion to alter or amend the judgment--from denial of which Norwood did file a timely appeal--is not an ordinary Rule 59(e) motion limited to a narrow criticism or new objection. Instead, the motion covers (in 59 pages) more or less the same points that Norwood had earlier made to the district court and now repeats to us; indeed, the district court tersely denied the motion relying on its original decision. Under these circumstances, it seems to us that Norwood's appellate arguments are within the scope of its Rule 59(e) motion and are properly before us on appeal from the denial of that motion.

2. Turning to the merits, the first count in Norwood's complaint--effectively, a contract claim--rests on its assertion that New England Power breached its 1983 promises.[4] According to Norwood, New England Power was obligated to supply Norwood with power during the contract term, on a cost-justified, FERC-regulated basis, at the same rate level at which power was offered to affiliates of New England Power. Norwood asserts that New England Power breached these supposed promises by selling its low-cost generation facilities, providing Norwood with a substitute fixed rate based on pre-divestiture costs, and switching to market-based and standard offer rates for sales to its own affiliates.

The explicit target of this count is the contract termination charge imposed by the amended FERC Tariff No. 1 on non-settling purchasers who choose to terminate their requirements contracts without giving the requisite multi-year notice. Since other Tariff No. 1 purchasers (including the affiliates) appear to have settled, Norwood may be the only purchaser left in this category--although the other purchasers will also pay contract termination charges computed on a somewhat different basis. Norwood says the alleged breach by New England Power excuses Norwood's own abandonment of the contract, thereby avoiding a termination charge allegedly amounting to about $78 million over the remainder of the ten-year period.

The district court rejected Norwood's contract claim on two different grounds. It said that the claim was barred by the filed rate doctrine which--in the aspect pertinent here--limits attacks outside the regulatory process on tariffed rates filed with federal regulatory agencies. E.g. *Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981).* [5] The district court also ruled, in the alternative, that the agreements were not breached by New England Power, because all it had promised to do was to provide FERC Tariff No. 1 rates to Norwood, which New England Power continued to do until Norwood itself renounced its requirements contract in March 1998. *Town of Norwood, 23 F. Supp. 2d at 119.*

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[4] The 1983 antitrust decree is enforceable in the district court, see generally *In re Pearson, 990 F.2d 653, 657 (1st Cir. 1993)*, and a breach of the contract might amount to a breach of the decree. However, the decree itself did no more than adopt the settlement agreement and power contract; thus, if these commitments were not breached, neither was the decree.

We agree with Norwood that the filed rate doctrine does not bar Norwood's contract claim. It is true that, absent some exception, Norwood could not use its contract claim as a vehicle to attack the validity of the FERC tariff imposing the termination charge; the filed rate doctrine protects the agency's authority over tariffed rates and prefers a prevailing tariff (unless set aside by the agency) over any separate contractual arrangements, *AT&T v. Central Office Tel., Inc., 524 U.S. 214, 222-24, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998).* While the termination charge is not a traditional "rate" for continuing service, the filed rate doctrine sweeps more broadly and governs ancillary conditions and terms included in the tariff. *Id. at 224-25.*

Yet, under the amended tariff itself, whether a termination charge applies depends on whether there is a requirements contract in force. And FERC has at most approved only the generic terms of the amended tariff; it has not determined whether Norwood's prior obligation to buy from New England Power was vitiated by a breach on the part of New England Power, *New England Power Co., 84 F.E.R.C. P61,175, at 61,920 (1998),* or some other means. See note 2, above. Perhaps it could have decided such issues, but it often leaves contract breach issues to courts, *Southern Cal. Edison Co., 85 F.E.R.C. P61,023, at 61,069 (1998),* and it appears to have done so here. Thus, the tariff may be protected by the filed rate doctrine but whether the tariff applies to Norwood depends on the extent of Norwood's contractual obligations.

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[5] As explained in our companion decision, the doctrine has various facets. It is the broader limitation on civil litigation that is of concern here and not the narrower aspect discussed in our companion case.

This brings us to the district court's alternative holding that New England Power did not breach the contract. The facts claimed by Norwood to be such a breach are undisputed; they are the sale of facilities, the new terms for other customers, and the freezing of Norwood's rate. The question is whether those acts comprised a breach of contractual terms, an issue of law to be determined from the words of the contract, if they are unambiguous, and otherwise by the words along with whatever extrinsic evidence may cast light on the parties' intent. *Bank v. IBM, 145 F.3d 420, 424 (1st Cir. 1998).* Here, the district court found that the words alone refuted Norwood's claim. *Town of Norwood, 23 F. Supp. 2d at 119.*

The original 1983 power contract is pithy in its pertinent language: New England Power promises to supply Norwood its requirements pursuant to the former's FERC No. 1 Tariff, "filed with FERC, as [it] may be amended from time to time." At the time, New England Power's FERC Tariff No. 1 were its general cost-based offering of power to wholesale customers. But nothing in the contract explicitly required that the power be furnished from any specific set of generating facilities, or that New England Power's own affiliates continue to buy their power under this tariff, or that the rates be based upon costs calculated under any specific cost formula covering any specific period.

Norwood argued in the district court that the agreement's terms were ambiguous and, specifically, that "FERC Tariff No. 1" had a specialized meaning and reflected implicit conditions, i.e., that the rates be based on current costs and used equally for New England Power's own affiliates. But while extrinsic evidence can be admitted to show ambiguity and to resolve it, see *Donoghue v. IBC USA (Publications), Inc., 70 F.3d 206, 215 (1st Cir. 1995)*, Norwood's affidavits show only that its aim was to achieve those goals and that FERC Tariff No. 1 was at that time structured as a traditional utility offering. Accordingly, we agree with the district court that the contract did not contain a promise that ownership of New England Power's facilities or equality of treatment vis a vis New England Power's affiliates would endure.

Probably Norwood assumed at the time that the world would continue as before, but there is an important difference between assumptions that exist when a contract is signed and promises built into a contract comprising a commitment. Under certain circumstances, the mere failure of underlying assumptions can release a party from a contract--one specific doctrine is frustration of purpose [6] --but it would take a developed line of reasoning, legal precedent, and specific facts showing the centrality of the assumptions and the extent to which their alteration makes it unjust to hold the unhappy party to its own promises. See generally II Farnsworth, Farnsworth on Contracts ch. 9 (2d ed. 1998).

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[6] The textbook example is the sale of a seat for a coronation later canceled. *Krell v. Henry, [1903] 2 K.B. 740* (C.A.); see also *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277 (7th Cir. 1986)*. Other doctrines related to failure of assumptions are those of mistake, II Farnsworth, Farnsworth on Contracts §§ 9.2-9.4 (2d ed. 1998), and impossibility, id. §§ 9.5-9.6.

Norwood has made no such developed argument based on disappointed assumptions. The argument would probably be uphill in any event since New England Power has continued to offer Norwood the gist of what it was promised: a cost-based, long-term supply of electricity, subject to FERC regulation. In all events, it is normally not error at all, let alone plain error, for a court to ignore a possible claim or defense that a party fails to proffer and pursue. E.g., *Amcel Corp. v. International Executive Sales, Inc., 170 F.3d 32, 35-36 (1st Cir. 1999).*

3. This brings us to Norwood's pure antitrust claims, which are almost certainly weaker but (ironically) less easily disposed of on a motion to dismiss. Although there are numerous strands in Norwood's antitrust claims, two are of foremost importance. One is a claim, primarily based on section 2 of the Sherman Act, that New England Power has engineered a "price squeeze" designed to undercut Norwood's ability to compete with New England Power's own retail affiliates. The other is a claim under section 7 of the Clayton Act that New England Power's sale of assets threatens to increase wholesale power prices in New England for purchasers like Norwood.

The district court dismissed all of Norwood's antitrust claims based on the filed rate doctrine. As already noted, one aspect of the doctrine protects a party from civil claims based on its implementation of tariffed rates (and ancillary tariffed matters) that are directly regulated by federal agencies like FERC. Its origin is the now-ancient *Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922);* but not very long ago the Supreme Court reaffirmed the Keogh doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986),* despite Judge Friendly's view that the doctrine had outlived its usefulness, *Square D Co. v. Niagara Frontier Tariff Bureau, 760 F.2d 1347 (2d Cir. 1985).*

Norwood's price squeeze claim, in particular, rests on the combined effect of two different tariffs: the contract termination charge imposed on Norwood under New England Power's amended FERC Tariff No. 1; and the wholesale standard offer rate that was offered to New England Power's affiliates but not to municipalities like Norwood, a tariffed offering originally filed by New England Power and assumed by USGenNE as part of the FERC-approved asset sale. Both tariffs are not only subject to FERC regulation under the "just and reasonable" standard imposed by the Federal Power Act, *16 U.S.C. § 824d*(a), but they were also actively at issue in the FERC proceedings described in our companion decision. [7]

The question, then, is whether Norwood can establish a pertinent limitation on or exception to the filed rate doctrine. Norwood's broadest claim is that the doctrine should not apply to antitrust cases involving price squeezes, a view endorsed in some measure by several circuits, *City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1177-79 (8th Cir. 1982)*, cert. denied, *459 U.S. 1170, 74 L. Ed. 2d 1013, 103 S. Ct. 814 (1983); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981)*, and by the always enlightening Areeda treatise, IA Areeda & Hovenkamp, Antitrust Law P 244e (rev. ed. 1997), But the Supreme Court has itself applied the filed rate doctrine to antitrust claims generally, e.g., *Square D Co., 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922*, and most of the lower court cases that have excluded particular price squeeze claims appear to have done so on grounds that do not apply here.

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[7] *New England Power Co., 83 F.E.R.C. P61,174 (1998)*, reh'g denied, *84 F.E.R.C. P61,175 (1998); New England Power Co., 82 F.E.R.C. P61,179 (1998)*, reh'g denied, *83 F.E.R.C. P61,275 (1998); New England Power Co., 81 F.E.R.C. P61,281 (1997)*, reh'g denied, *83 F.E.R.C. P61,265 (1998).*

Specifically, the traditional price squeeze involves a defendant who as monopolist supplies the plaintiff at one level (e.g., wholesale), competes at another (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to common customers. See *Town of Concord v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990),* cert. denied, *499 U.S. 931, 113 L. Ed. 2d 268, 111 S. Ct. 1337 (1991).* A few decisions, like City of Kirkwood, have rejected the filed rate defense in such situations where the monopolist supplier was subject to federal regulation at the wholesale level but not at the retail level. *671 F.2d at 1177-79.* But the main concern--that no regulatory agency could afford full relief--is inapposite here because FERC regulates both of the tariffs in question. See IA Areeda & Hovenkamp, supra, P 244e, at 90-91.

Next, Norwood says that the filed rate doctrine should not apply where the "regulated" rates have been left to the free market, the general direction in which FERC is moving. Of course, if New England Power's rates were truly left to the market, with no filing requirement or FERC supervision at all, the filed rate doctrine would by its terms no longer operate. See IA Areeda & Hovenkamp, supra, P 241c, at 30; cf. *Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966).* But unlike some other regulatory agencies, see IA Areeda & Hovenkamp, supra, P 251i, at 161-62, FERC is still responsible for ensuring "just and reasonable" rates and, to that end, wholesale power rates continue to be filed and subject to agency review, *16 U.S.C. § 824d.*

To be sure, FERC now waives its requirement that filed rates and rate increases be accompanied and justified by cost-of-service data, 18 C.F.R. §§ 35.12, 35.13, where the applicant has shown that it lacks, or has mitigated, market power in generation and transmission. See generally *Louisiana Energy & Power Auth. v. FERC, 141 F.3d 364, 365 (D.C. Cir.*

1998). [8] But whether or not such data was submitted, the relevant rates and termination charge were individually filed with FERC and are subject to ongoing FERC regulation. It is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine. See *Square D Co., 476 U.S. at 417; Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 374, 101 L. Ed. 2d 322, 108 S. Ct. 2428 (1988).*

Further, FERC did address the concerns presented by Norwood and others about the potential anticompetitive effects of the filings (albeit not in trial-type hearings). FERC found the contract termination charge to be in principle a reasonable recovery of expected revenues less avoided costs. *New England Power Co., 83 F.E.R.C. P61,174, at 61,723 (1998).* As for the wholesale standard offer rate schedule, FERC explained its origins in state regulatory policy and was apparently unpersuaded by Norwood's objections. *New England Power Co., 82 F.E.R.C. P61,179, at 61,664-65 (1998);* see also *New England Power Co., 83 F.E.R.C. P61,265 (1998).* The agency left the door open for future administrative challenges to both the contract termination charge and the wholesale standard offer rate. *New England Power Co., 83 F.E.R.C. P61,174, at 61,724; New England Power Co., 81 F.E.R.C. P61,281, at 62,371 (1997).*

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[8] FERC's regulations also provide an exception to the cost-of-service requirements for rate changes that do not amount to rate increases. 18 C.F.R. § 35.13(a)(2)(iii). This was the exception under which FERC originally accepted New England Power's contract termination charge and standard offer rates for filing, although it considered the no-market-power exception in the related divestiture proceeding. *New England Power Co., 82 F.E.R.C. P61,179, at 61,661-64 (1998).*

Norwood also objects that the filed rate doctrine only protects against damage claims and, it says, in this instance it seeks declaratory and injunctive relief; apparently it contemplates relief that would block or nullify the termination charge and possibly require the wholesale standard offer rates to be made available to it. It is quite true that one rationale of the filed rate doctrine is to prevent discriminatory damage awards to different customers, *Keogh, 260 U.S. at 163*, and that in at least two cases the Supreme Court carved out a potential exception for antitrust injunctive relief, see *Square D Co., 476 U.S. at 422 & n.28; Georgia v. Pennsylvania Ry. Co., 324 U.S. 439, 454-62, 89 L. Ed. 1051, 65 S. Ct. 716 (1945).*

But in Georgia and Square D, the Court was concerned with possible price-fixing conspiracies that conceivably could have been enjoined without tampering with the tariffed rates themselves, see *Georgia, 324 U.S. at 455;* the relief would merely assure non-collaborative individual filings by the supposed conspirators. Here, any meaningful relief as to the price squeeze would require the alteration of tariffs--and not merely tariffs subject to regulation but tariffs actually scrutinized repeatedly by FERC in the companion-case proceedings. In part, the rationale for the filed rate doctrine is to protect the exclusive authority of the agency to accept or challenge such tariffs, *Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577-78, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981)*--a goal that would be undermined by Norwood's distinction in the present case.

Norwood also argues that the doctrine should not apply to block a claim brought by a plaintiff who is a competitor of the defendant--a view basically endorsed by the Areeda treatise, see IA Areeda & Hovenkamp, supra, P 247c. But the lower courts are both divided and confused in their discussion of this issue; and there are more than two sides. [9] Attempts to reason from the few arguably relevant Supreme Court cases, see *AT&T v. Central Office Tel., Inc., 524 U.S. 214, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998); Georgia v. Pennsylvania Ry. Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*, are almost hopelessly inconclusive, but no such exception for plaintiff-competitors has ever been explicitly adopted by that court.

This is a more doubtful case than most for developing a new "competitor" exception to the filed rate doctrine. Although Norwood may be in limited competition with New England Power affiliates, it is primarily a consumer challenging a filed rate that it does not want to pay (the contract termination charge), and--as we will see--its position as a "competitor" is qualified. Although one case to which Norwood points has adopted a competitor exception where the plaintiff was both a competitor and a consumer, *City of Groton, 662 F.2d at 927-29*; cf. *City of Kirkwood, 671 F.2d at 1179*, it appears to have been a standard price squeeze case where one of the relevant prices was not reviewable by the federal agency. *City of Groton, 662 F.2d at 927.*

Finally, Norwood contends that a savings provision added by the Energy Policy Act of 1992, *16 U.S.C. § 824k*(e)(2), somehow overrides the filed rate doctrine. The provision provides that "sections 824i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws." Id. But by its terms this provision only refers to limited sections of the Federal Power Act, notably not including those that establish the rate filing requirements, *16 U.S.C. § 824d*, and to which the filed rate doctrine relates.

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[9] Compare *Pinney Dock & Transp. Co. v. Penn Central Corp., 838 F.2d 1445, 1455-57* (6th Cir.) (no exception), cert. denied, *488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988)*, with *Cost Management Servs., Inc. v. Washington Natural Gas Co., 99 F.3d 937, 945-46 (9th Cir. 1996)* (exception in case where plaintiff was competitor, not customer), and *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 927-29 (2d Cir. 1981)* (exception in case where plaintiff was customer and competitor).

As already noted, the law on the filed rate doctrine is extremely creaky. Our own principal price squeeze decision, *Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990)*, cert. denied, *499 U.S. 931, 113 L. Ed. 2d 268, 111 S. Ct. 1337 (1991)*, threw out the claim on the merits, expressing great skepticism about such claims as to regulated rates but never mentioning the filed rate doctrine. *Id. at 25-29.* Yet this case is not a good vehicle for considering any cutting back on the doctrine, to whatever extent Square D permits adjustment, partly because the Sherman Act claims pressed by Norwood are themselves so doubtful.

There are at least two grounds for extreme skepticism. The usual section 2 claim requires monopoly or near monopoly power in some market, and a wrongful exclusionary act designed to enhance such power in that market or to achieve an improper advantage in another market. E.g., *Otter Tail Power Co. v. United States, 410 U.S. 366, 377, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973); United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).* It is not clear just what monopoly power Norwood attributes to New England Power, which has now sold its main generating assets and, so far as it may retain a dominant position in transmission, is constrained to wheel power for others under Order No. 888. See *New England Power Co., 82 F.E.R.C. P61,179, at 61,662 (1998).*

Further, it is hard to see just what wrongful act is involved. Although sustained by FERC's regulatory policies, the termination charge is largely a surrogate for recovery of net proceeds from a prior contract renounced by Norwood; and the refusal to give Norwood the benefit of the wholesale standard offer rates appears to reflect the fact that as a municipality Norwood is not required to provide competitors access to its customers or afford them retail standard offer rates. Mass. Gen. Laws ch. 164, § 47A. These are very far from the usual kinds of wrongdoing that support a section 2 claim.

It is also very far from clear that Norwood is seriously threatened as a competitor. Apparently most of its customers are captive, see Mass. Gen. Laws ch. 164, § 47A, and Norwood has no obligation to give them access to other suppliers, id. Some fringe competition may exist for new customers who can choose where to locate, or old ones inclined to relocate--e.g., customers choosing between Norwood and adjoining communities serviced by Mass Electric. But the extent that such choices may be affected by the standard offer rates is unclear. The rates are not automatically available to benefit either new customers or those who move, Mass. Regs. Code tit. 220, § 11.04(9)(b)(2)(c); and the advantage they provide will disappear fairly soon because the rates quickly escalate. [10]

Of course, doubts about market power cannot be resolved on a motion to dismiss; and the "wrongful act" issue, although technically legal, has not been briefed and might depend in some measure on contextual facts at which we can only guess. But these doubts do reinforce a sense that this is not a case that calls out for revisiting the filed rate doctrine or for strenuous efforts to carve out exceptions that test the limits of the Supreme Court's reaffirmation of the doctrine in *Square D*.

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[10] Norwood says that by that time customers will have chosen a permanent source of supply; but it is quite unclear why any customer should commit itself for the long term based on a rate advantage known to be very temporary.

Norwood also makes a section 1 claim that the standard offer rates New England Power promised to other retailers as part of the settlement somehow constitute horizontal price fixing. But offer of those rates to customers is an ordinary vertical transaction, and the settlement did not set rates for other wholesale suppliers; USGenNE's later assumption of the obligation is simply the transfer of the seller's existing obligation incident to a sale of assets. [11]

4. This brings us to Norwood's other antitrust claim worth discussing, namely, that New England Power's sale of its fossil and hydroelectric generating assets violates section 7 of the Clayton Act. [12] The main charge here is that the sale will enhance market power in the wholesale electricity market in New England and tend to exert upward pressure on wholesale prices to the detriment of purchasers in that market, including Norwood. This claim is very doubtful, but it is not clear how it can be resolved on this appeal solely upon a motion to dismiss.

Ordinarily, the transfer of generating assets to a new entrant could hardly reduce competition: it lessens the market power of the seller and adds a new competitor. But

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[11] Norwood's complaint also alleged tying in violation of section 1 of the Sherman Act, but Norwood does not discuss this claim on appeal and it is therefore waived. *Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1113 (1st Cir. 1993).*

[12] Norwood's complaint also alleged a violation of section 3 of the Clayton Act, *15 U.S.C. § 14,* but it does not discuss this claim in its brief on appeal (save for a cursory mention in the statement of questions presented). The claim is therefore waived. *Gamma Audio & Video, Inc., 11 F.3d at 1113.*

USGenNE's parent already owns some nearby generating assets (apparently in New York); and depending on their size and the definition of markets, in theory USGenNE and its New York affiliate could end up together with more market power than previously possessed by New England Power itself. True, market power in transmission and distribution may be vitiated by the open access requirements imposed by FERC's Order No. 888 [13] (discussed further in our companion opinion); but greater concentration of generating assets in a few hands--the hands of USGenNE and its associated companies--could still be a problem, depending upon how feasible long distance transmission may be (and Norwood's complaint vaguely alleges some limitations).

On this claim, the filed rate doctrine is of no use to the defendants. For reasons that reflect more history than logic, the limitations on antitrust litigation derived from federal administrative regulation reflect a schizophrenic split. Direct antitrust attacks on federally regulated rates have (with some exceptions discussed above) been limited by the filed rate doctrine. E.g., *Square D Co., 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922.* So have attacks on other regulated matters underlying rates (like power allocation among electricity customers). See *Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 371, 101 L. Ed. 2d 322, 108 S. Ct. 2428 (1988);*

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[13] Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, *61 Fed. Reg. 21540 (1996)* (rule codified as revised at 18 C.F.R. pts. 35 & 385), clarified, *76 F.E.R.C. P61,009 (1996), 76 F.E.R.C. P61,347 (1996)* and *79 F.E.R.C. 61,182 (1997),* order on reh'g, Order No. 888-A, *62 Fed. Reg. 12274 (1997),* order on reh'g, *Order No. 888-B, 81 F.E.R.C. P61,248 (1997),* order on reh'g, *Order No. 888-C, 82 F.E.R.C. P61,046 (1998),* petitions for review pending sub nom. Transmission Access Policy Study Group v. FERC, Nos. 97-1715, et al. (D.C. Cir. Mar. 30, 1998).

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966-67, 90 L. Ed. 2d 943, 106 S. Ct. 2349 (1986). But the Supreme Court says there is otherwise no across-the-board antitrust immunity for agency-approved transactions. See *California v. Federal Power Comm'n, 369 U.S. 482, 8 L. Ed. 2d 54, 82 S. Ct. 901 (1962).*

Although it is not clear in all cases where the boundary lies between the filed rate doctrine and the default rule retaining antitrust liability, mergers or sales of assets by federally regulated utilities have been left open to antitrust challenge even though the resulting rates were subject to federal regulation and even though the merger or sale had been explicitly approved by the regulator. See *Northeast Utils. Serv. Co. v. FERC, 993 F.2d 937, 947 (1st Cir. 1993).* See generally *California, 369 U.S. 482, 8 L. Ed. 2d 54, 82 S. Ct. 901.* Sometimes federal agencies do have explicit power to immunize approved mergers, see *Denver & Rio Grande Western Ry. Co. v. United States, 387 U.S. 485, 496-97, 18 L. Ed. 2d 905, 87 S. Ct. 1754 (1967),* but FERC does not. Cf. *South Austin Coalition Community Council v. SBC Communications Inc., 191 F.3d 842, 844 (7th Cir. 1999).*

This discrepancy in case-law treatment is debatable policy, see generally IA Areeda & Hovenkamp, supra, P 243 (criticizing California v. Federal Power Commission), and there may well be sound arguments for revisiting the issue in light of recent improvements in FERC's analysis of mergers and asset transfers, see generally Pierce, The Antitrust Implications of Energy Restructuring, 12 Nat. Resources & Env't 269 (1998). But the distinction has been adopted by the Supreme Court and never abandoned, compare *Otter Tail Power Co., 410 U.S. at 373,* with *Square D Co., 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922,* and the defendants have not even attempted to defend the use of the filed rate doctrine to protect the sale.

Instead, New England Power argues that Norwood lacks standing to make a section 7 claim because the sale is not causally linked to Norwood's primary concern, the contract termination charge. But at least as a matter of pleading, Norwood is still entitled to make a section 7 claim as a consumer of wholesale power on the premise that the sale will increase concentration in the wholesale market and ultimately increase prices to it. PG&E says that Norwood is protected by its long-term contract with Northeast Utilities, but long-term is not forever and what Norwood purports to worry about is a long-term upward pressure on wholesale prices.

Alternatively, PG&E complains that Norwood's complaint has never identified the alleged pre- and post-divestiture market shares attributed to PG&E affiliates. Just how much detail is required in notice-pleading complaints does not have a formulaic answer; we have been willing to sustain dismissals where a plaintiff's antitrust claim was expressed only in the bare words of the statute, seemed highly improbable, and was not strengthened by more specific detail offered in the face of a direct challenge on motion to dismiss. See, e.g., *DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 55-57 (1st Cir. 1999);* see also II Areeda & Turner, Antitrust Law § 317a, at 72 (1978).

But it is one thing to sustain a dismissal where the lack of detail was an issue pressed in the district court and the plaintiff, having had notice and incentive to respond, failed to do so by bolstering its complaint, either by amendment or by providing the requisite information in opposing dismissal. Here, this "lack of detail" claim was not clearly present in the district court and is not even close to its ground of disposition; and the section 7 claim, although doubtful on the facts, is not inherently impossible. Cf. *Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1080-81 (1st Cir. 1993).* We think that a deficiency in detail is a matter to pursue on remand, although some form of summary disposition on this ground may yet be available.

A different reason for doubt as to the antitrust claim is that FERC itself found, after a regulatory analysis, that the sale would not enhance market power. *New England Power Co., 82 F.E.R.C. P61,179, at 61,658-59 (1998)*, reh'g denied, *New England Power Co., 83 F.E.R.C. P61,275 (1998)*. So far as we can tell, this determination rested in principal part on a judgment that power generated by USGenNE affiliates in New York was already committed under long-term contracts and was not therefore a viable constraint on prices in New England. *New England Power Co., 82 F.E.R.C. P61,179, at 61,659*. This is akin to an approach taken by the Supreme Court itself in discounting the committed coal production of a merger partner. See *United States v. General Dynamics Corp., 415 U.S. 486, 501-11, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)*.

Whatever its rationale, FERC's ultimate finding, if right, probably dooms Norwood's Clayton Act claim. There is no indication that FERC's test of competition (applying the same guidelines as the Department of Justice and Federal Trade Commission, see *New England Power Co., 82 F.E.R.C. P61,179, at 61,658 (1998))* is weaker or significantly different than that of the Clayton Act. See IV Areeda, Hovenkamp & Solow, Antitrust Law P 932d (1998) (discussing judicial approval of DOJ-FTC guidelines). Norwood was a party in the regulatory proceeding that led to the finding and actively contested the issue.

One might expect that FERC's finding in the regulatory proceeding would be binding on Norwood under the doctrine of issue preclusion. But the question turns out to be complicated: even where the parties are the same, issue preclusion based on an administrative determination is sometimes allowed and sometimes not, depending on the nature of the proceeding, the nature of the issue, the procedural rights afforded, and other considerations. See Restatement (Second), Judgments § 83 (1982); II Davis & Pierce, Administrative Law Treatise §§ 13.3-13.5 (3d ed. 1994).[14] The preclusion issue has not been briefed by the parties in this court and, if it is to be pursued, this is best done on remand.

A final problem for Norwood relates to relief. Even on the doubtful assumption that the sale has created a threat of increased market power sufficient for a Clayton Act violation, it may be not easy for Norwood to show monetary damages now. And while divestiture is technically a remedy permitted to private parties in section 7 suits, the Supreme Court has suggested that it may not always be proper at the behest of private parties even where the government could have secured it. *California v. American Stores Co., 495 U.S. 271, 295-96, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990).*

The parties may wish to consider on remand whether these loose ends justify further litigation. There may be an equitable case for some further accommodation of Norwood, at least as to the amount of any termination charge, especially if the settling parties have gotten better terms. Cf. *New England Power Co., 83 F.E.R.C. P61,174, at 61,723 n.13 (1998).* Given the possibilities of further expensive litigation (on certiorari, in the district court, and at FERC), it may be worth the parties' time to consider a settlement before pressing further.

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[14] Compare *Baez-Cruz v. Municipality of Comerio, 140 F.3d 24, 29-31 (1st Cir. 1998),* and *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 746 F.2d 375, 377-79 (7th Cir. 1984),* with *Second Taxing Dist. of Norwalk v. FERC, 221 U.S. App. D.C. 136, 683 F.2d 477, 483-84 (D.C. Cir. 1982),* and *AT&T v. FCC, 602 F.2d 401, 410 n.48 (D.C. Cir. 1979).*

The district court's judgment dismissing the complaint on the merits is affirmed as to all claims other than that under section 7 of the Clayton Act; and the section 7 claim is remanded to the district court for further proceedings consistent with this decision.

It is so ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No: 97-10818-PBS

TOWN OF NORWOOD, MASSACHUSETTS
Plaintiff

v.

NEW ENGLAND POWER COMPANY,
NEW ENGLAND ELECTRIC SYSTEM,
PACIFIC GAS & ELECTRIC COMPANY, and
PG&E CORPORATION,
Defendants

ORDER OF DISMISSAL

SARIS, D.J.

In accordance with the Court's allowance of the defendants motions to dismiss, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

/Signature

Deputy Clerk

September 29, 1998

To: All Counsel

TOWN OF NORWOOD, MASSACHUSETTS, Plaintiff, v. NEW ENGLAND POWER COMPANY, NEW ENGLAND ELECTRIC SYSTEM, PACIFIC GAS & ELECTRIC COMPANY and PG&E CORPORATION, Defendants.

CIVIL ACTION NO. 97-10818-PBS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

23 F. Supp. 2d 109; 1998 U.S. Dist. LEXIS 15633

September 28, 1998, Decided

DISPOSITION: Motions of New England Power Company and New England Electric System (Docket Nos. 53 & 80) and of Pacific Gas & Electric Corporation (Docket No. 81) to dismiss Norwood's Second Amended Complaint ALLOWED. Defendant's motion to dismiss (Docket No. 3) DENIED as moot.

CORE TERMS: wholesale, generation, electric, antitrust, tariff, affiliates, retail, termination, settlement, transmission, market-based, breach of contract, customers, settlement agreement, divestiture, public utilities, motion to dismiss, energy, restructuring, electricity, non-nuclear, antitrust laws, power supply, Sherman Act, approving, vertically-integrated, competitive, approve, Federal Power Act, federal regulatory

COUNSEL: For NORWOOD, TOWN OF, Plaintiff: Alan K. Posner, Kenneth M. Barna, Rubin & Rudman, Boston, MA.

For NORWOOD, TOWN OF, Plaintiff: Charles F. Wheatley, Jr., Wheatley & Ranquist, Annapolis, MD.

For NEW ENGLAND POWER CO, NEW ENGLAND ELECTRIC SYSTEMS, Defendants: David H. Erichsen, Harold Hestnes, Peter A. Spaeth, Vinita Chopra, Hale & Dorr, Boston, MA.

For NEW ENGLAND POWER CO, Defendant: Edward Berlin, Swidler & Berlin, Washington, DC.

For ATTORNEY GENERAL, MA, interested party: George B. Dean, Office of the Attorney.

For THE STATE OF RHODE ISLAND, interested party: Alan M. Shoer, Office of the Attorney General, Providence, RI.

For PACIFIC GAS & ELECTRIC COMPANY, Defendant: Steven W. Phillips, Richard M. Brunell, Foley, Hoag & Eliot, Boston, MA.

JUDGES: PATTI B. SARIS, United States District Judge.

OPINION BY: PATTI B. SARIS

OPINION: MEMORANDUM AND ORDER
ON MOTIONS TO DISMISS

September 28, 1998

Saris, U.S.D.J.

This action asserts antitrust and breach of contract claims arising from the comprehensive restructuring of the electric utility industry. The Town of Norwood, Massachusetts ("Norwood") distributes electricity to businesses and residences within its borders. Until recently, Norwood purchased all of its wholesale power requirements from defendant New England Power Company ("NEPCO") pursuant to a long-term contract which arose from a 1983 settlement of an antitrust suit approved by another judge of this Court. The current dispute was sparked when NEPCO, as part of 1996 settlements with the Massachusetts and Rhode Island governments, agreed to sell virtually all of its non-nuclear generation facilities, and to assign wholesale supply contracts with two of its affiliates to the U.S. Generating Company ("USGen"). While NEPCO's retail affiliates were charged market-based wholesale power rates under these assigned contracts, NEPCO was charging cost-of-service rates under its tariff to Norwood and others.

Seeking to enjoin the divestiture and challenging the resulting rate differential, Norwood filed this suit. Subsequently, the Federal Energy Regulatory Commission ("F.E.R.C." or the "Commission"), on NEPCO's application, approved the state settlements, divestiture, contract assignments and new rate schedules over Norwood's objections. Norwood reacted to F.E.R.C.'s approval by terminating its contract with NEPCO and signing a long-term wholesale power supply contract with Northeast Utilities Service Company ("NUSCO"). NEPCO, in turn, asked F.E.R.C. to approve a "contract termination charge" as an amendment to the tariff applicable to Norwood. F.E.R.C. approved the charge, again over Norwood's objection. In the meantime, Norwood has twice amended its complaint here.[1]

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[1] Norwood's first amended complaint added NEPCO's parent, New England Electric System ("NEES"), the purchaser of the generation assets, U.S. Generating Company ("USGen"), and USGen's parent, Pacific Gas & Electric Company. Norwood's Second Amended Complaint dropped USGen as a defendant, added PG&E Corporation, and made several substantive changes. It asserts claims for breach of contract approved by antitrust decree and order (Count I); violation of Section 7 of the Clayton Act, *15 U.S.C. § 18* and Section 1 of the Sherman Act, *15 U.S.C. §* 2 (Count III); and violation of Section 3 of the Clayton Act, 15 *U.S.C. §* 14 (Count IV).

All defendants move to dismiss on several grounds, including the preclusive effect of the "filed rate doctrine" in matters pertaining to prices for the wholesale supply of power. After two hearings on the matter, the motions to dismiss are ALLOWED.

BACKGROUND

In considering defendants' motion to dismiss, the Court takes as true all allegations in the complaint and makes reasonable inferences in the plaintiff's favor. See *Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).* In addition to the allegations contained in the four corners of the complaint, the Court considers materials attached to the complaint and matters of public record, including submissions to and decisions of the F.E.R.C.. See id. (permitting consideration of "official public records" without requiring the conversion of a motion to dismiss into a motion for summary judgment). However, the Court does not consider the affidavits submitted by parties.

1. The Industry

Three major vertical stages exist in the electric utility industry: (1) power production, which is the generation of electricity; (2) the transmission of high voltage electric power from the points of generation to substations for conversion to delivery voltages; and (3) the distribution of low voltage electricity to individual homes and businesses. See *Town of Concord v. Boston Edison Co., 915 F.2d 17, 19-20 (1st Cir. 1990)* (describing the organization of the industry).

Under state authority, see Mass. G.L. c. 164, §§ 34 et seq. (1997), Norwood owns and operates an electric distribution system which supplies power to its retail customers, almost all of which are businesses and households located in the town. Since Norwood provides only distribution services, it is dependent on other companies to generate or otherwise supply power and then to transmit it via high-voltage lines from the generators to Norwood's local distribution network. Generation and transmission services in New England have historically been performed by vertically-integrated investor-owned utilities.

Defendant NEPCO is a generation subsidiary of one such utility, defendant New England Electric System ("NEES"). Though some distribution systems in Massachusetts and other New England states are run by municipalities like Norwood, most are owned by vertically-integrated utilities that provide generation and transmission services. NEES is also the parent of two such retail distribution utilities, Massachusetts Electric Company ("Mass. Electric") and Narragansett Electric Company ("Narragansett"). Mass. Electric serves retail customers in Massachusetts, and Narragansett serves retail customers in Rhode Island. In other words, NEPCO has historically sold power that it generates both to municipalities like Norwood and to investor-owned utilities, including its own affiliates.

2. The Antitrust Settlement and Court Order

The story begins in 1974, when Norwood brought an antitrust suit against NEPCO before another judge of this Court. At the time, Norwood received both generation and transmission services from Boston Edison Company, another large vertically-integrated utility. Norwood claimed that NEPCO refused to deal with Norwood and that Boston Edison refused to "wheel" power from NEPCO in violation of the Sherman Act. *15 U.S.C. §§ 1*-2. It complained that NEPCO refused to sell firm requirements wholesale power to Norwood under its tariff (Tariff 1) at the same rates that it was charging Mass. Electric and Narragansett. These two affiliates were parties with NEPCO to "wholesale requirements contracts," meaning that NEPCO ensured they were supplied all of the power they needed from either NEPCO-owned generators or power pool supplies available to NEPCO.

On April 12, 1983, NEPCO and Norwood settled the case, and the settlement agreement was entered as a Court decree. By the settlement, the parties entered into a power contract in which NEPCO agreed to "provide all-requirements electric service to Norwood under NEP[CO]'s F.E.R.C. Tariff," (Power Contract, Article I), and to sell 100 percent of Norwood's electric requirements until October 31, 1998, the end of the contract term, at its "Tariff 1" rate. (Power Contract, Article IV.) This tariff rate, which NEPCO also charged its affiliates, was filed with and approved by the F.E.R.C.. The parties agreed at the time that "neither NEP[CO] nor Norwood has a present intention to terminate all-requirements service." (Power Contract, Article IIIB.) The parties also agreed not to give a notice of termination prior to November 1, 1991, and not to specify a termination date prior to November 1, 1998. (Power Contract, Article IIIB; see also Settlement Agrmt. P 4.6.) In 1989, Norwood exercised its contractual option to extend its contract with NEPCO until October 31, 2008.

3. Restructuring the Industry

Nationally, both state and federal authorities have initiated reforms to make the electric industry more competitive and to implement retail consumer choice. One of the principal means of increasing competition is to break up the vertically-integrated utilities, forcing the separation of the power supply function of generation from the delivery functions of transmission and distribution. The state and federal governments have played interdependent roles in a vast restructuring in New England. The states regulate the retail distribution of electricity occurring within their borders, including the prices charged to households and businesses by distribution systems. The Rhode Island legislature passed the Rhode Island Utility Restructuring Act of 1996, which calls for a restructuring of the industry in order to implement a program of consumer retail choice. See R.I. Gen. Laws §§ 39-1-1 et seq. (1996). Among other things, the plan calls for the "unbundling" of the three stages of the power delivery system, meaning distribution companies have to allow different power supply companies access to their retail customers. See id. § 39-1-27.3.

The Massachusetts Attorney General took similar action in proceedings before the Massachusetts Department of Public Utilities in 1996. [2] On November 25, 1997, after the precipitating events of this case had taken place, the Massachusetts Legislature passed a law requiring electric companies "to accommodate retail access to generation services and choice of suppliers by retail customers." Mass. G.L. c. 164, § 1A (1997). Municipal light companies have not been required to allow competitive choice of generation supply within their borders. See id. § 47A(a).

Generation and transmission, which have interstate implications, are regulated at the federal level by the F.E.R.C.. On April 24, 1996, the F.E.R.C. issued its report on several final rules known collectively as Order No. 888, the goal of which was "to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers." Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, *61 Fed. Reg. 21,540 (1996)* (rule codified at 18 C.F.R. pts. 35 & 385) [hereinafter Order No. 888].

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[2] The Massachusetts Department of Public Utilities is now named the Department of Telecommunications and Energy.

NEPCO was involved in the industry restructuring efforts of both the Rhode Island and Massachusetts governments. In 1996, the NEES companies (NEPCO, Mass. Electric and Narragansett) reached a settlement agreement with Massachusetts and Rhode Island regulators to implement retail choice programs in the two states. Under this settlement with the states, to which Norwood was not a party, NEPCO agreed, among other things, to divest itself of its non-nuclear generation facilities and to terminate its wholesale power purchase contracts with its retail affiliates, subject to contract termination charges,[3] and transfer those contracts to another utility. The Massachusetts Attorney General, NEPCO, and twelve other interested entities filed the settlement agreement with the F.E.R.C. on September 30, 1996, and NEPCO promised to notify the F.E.R.C. of the details of the execution of the plan no later than October 1, 1997. Norwood timely moved to intervene in F.E.R.C. proceedings on the settlement on December 31, 1996.

4. This Litigation

On April 14, 1997, Norwood filed the original complaint in this lawsuit solely against NEPCO in an attempt to block the proposed divestment of its assets. The town moved for a preliminary injunction and for summary judgment, and NEPCO moved to dismiss. The Court heard all three motions on September 8, 1997 and denied both of Norwood's motions from the bench. NEPCO's motion to dismiss was taken under advisement, but the following factual developments precluded a decision on the motion last year.

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[3] According to NEPCO, the negotiated "contract termination charge" reflects the retail affiliate's share of the unrecovered costs of NEP's generating plants, reduced by the proceeds from the sale of these plants.

On October 1, 1997, NEPCO filed notice with F.E.R.C. that it had agreed to sell its non-nuclear generation assets to USGen, a wholly-owned subsidiary of Pacific Gas & Electric Company ("PG&E"), [4] and asked for the Commission's approval. In the filing, NEPCO requested approval of the assumption by USGen of NEPCO's power sales to Mass. Electric and Narragansett at so-called "Standard Offer Service" rates, which differed from NEPCO's Tariff 1 rates. USGen and NEPCO also requested approval of "market rate tariffs" for future transactions. Letter from NEPCO's Counsel to F.E.R.C. Secretary of 10/1/97. As a result, Norwood amended its complaint on November 21, 1997, adding NEES, USGen, and PG&E as defendants. NEPCO renewed its motion to dismiss the First Amended Complaint, and USGen and PG&E moved to dismiss as well.

NEPCO soon secured all necessary approvals from F.E.R.C. for its settlements and for its transfer of generation assets and power contracts to USGen. On November 26, 1997, over Norwood's objections, F.E.R.C. approved NEPCO's settlements with Mass. Electric, Narragansett, and the states. See *New England Power Co., 81 F.E.R.C. P61,281 (1997)* (letter order conditionally approving settlements); *New England Power Co., 83 F.E.R.C. P61,265* (June 3, 1998) (order denying Norwood's request for rehearing). On February 25, 1998, F.E.R.C. approved the sale of the generation facilities and the assignment of the wholesale power service contracts to USGen. The F.E.R.C. also approved the new market-based rates which would be implemented, subject to NEPCO's agreement to freeze rates to existing customers (like Norwood), even if NEPCO ends up paying more for replacement power than it currently charges wholesale customers. See *New England Power Co., 82 F.E.R.C. P61,179 (1998); New England Power Co., 83 F.E.R.C. P61,275* (June 10, 1998) (order on clarification and rehearing). Norwood has since petitioned the First Circuit for review of both of these Commission decisions pursuant to *16 U.S.C. § 825*l(b). See *Town of Norwood v. F.E.R.C., 81 F.E.R.C. P61,281 (1997) & 83 F.E.R.C. P61,365 (1998),* appeal docketed, No. 98-1847 (1st Cir. July 31, 1998) (settlement with affiliates and states); *Town of Norwood v. F.E.R.C., 82 F.E.R.C. P61,179 (1998); Town of Norwood v. F.E.R.C., 83 F.E.R.C. P61,275 (1998),* appeal docketed, No. 98-1876 (1st Cir. Aug. 7, 1998) (asset transfer).

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[4] As part of a corporate reorganization in 1997, PG&E Corporation became the parent of Pacific Gas & Electric Company. For purposes of this opinion, the collective entity is referred to as "PG&E."

Because the rates offered to Norwood under Tariff 1 were substantially higher than the rates NEPCO offered to its affiliates, Norwood alleges it was subjected to a 20 percent higher price for the same wholesale power service, and, thus, was effectively precluded from competing. (Sec. Am. Comp. P 6.) After the approvals of the merger and new rates by F.E.R.C., Norwood, claiming a "duty to mitigate damages," boldly took matters into its own hands. By letter of March 4, 1998, the town terminated its contract with NEPCO effective April 1, 1998. On March 3, 1998, after considering bids from five wholesale providers, Norwood had signed a firm wholesale power contract with NUSCO effective the day of F.E.R.C. approval of the USGen divestiture (February 25, 1998) until December 31, 2008. On March 24, 1998, NUSCO filed the contract and rate schedule pursuant to § 205 of the Federal Power Act, *16 U.S.C. § 824*(e), and F.E.R.C. accepted the submissions for filing. See NU Operating Cos., F.E.R.C. Dkt. No. ER98-2301-000 (Apr. 22, 1998) (letter order). NEPCO responded by requesting an amendment to Tariff 1, permitting its Tariff 1 customers the option of terminating service early subject to the payment of a contract termination charge ("CTC"). (Docket 83.) Those CTCs, a critical element of the restructuring of the industry at the federal level, were accepted for filing by F.E.R.C. on May 15, 1998. See *New England Power Co., 83 F.E.R.C. P61,174 (1998).* [5] The F.E.R.C., just weeks ago, denied Norwood's request for rehearing on the subject of the CTCs. See *New England Power Co., 84 F.E.R.C. P61,175* (Aug. 5, 1998). Norwood contends that this amendment requires it to pay $52 million in contract termination costs for its early termination.

Norwood submitted a Second Amended Complaint to the Court on April 29, 1998, updating the language of the allegations and dropping USGen as a party. The Second Amended Complaint contains four counts, alleging a breach by NEPCO of the 1983 settlement agreement with Norwood and antitrust violations.

DISCUSSION

NEPCO, joined by NEES, moves to dismiss Norwood's complaint on the basis of the filed rate doctrine, exhaustion, primary jurisdiction, and failure to state a claim. PG&E joins these bases and additionally asserts that the complaint fails to state a claim against it since it is merely the parent of USGen. The Court needs only to address the issue of the filed rate doctrine, which is dispositive.

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[5] As provided in F.E.R.C. Order No. 888, under the "revenues lost approach" for calculating stranded costs, the CTCs would compensate NEPCO the difference between the revenues it would have received under the contract term and the estimated market value of the "released capacity and energy." Id. at 6. This proposed formula differs from that applicable to the affiliates, which entered into "negotiated agreements." NEPCO stated to F.E.R.C. it would be willing to negotiate similar termination agreements with Norwood.

A. The Filed Rate Doctrine

The Federal Power Act ("FPA") governs "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce . . . ." *16 U.S.C. § 824*(b)(1). The F.E.R.C. has jurisdiction "over all facilities for such transmission or sale of electric energy," excluding local distribution and exclusively intrastate transmission. Id. Congress assigned the F.E.R.C. several responsibilities regarding its jurisdiction over electric facilities that are relevant to this case. First, § 203 of the FPA prohibits sale of facilities subject to F.E.R.C. jurisdiction by public utilities without permission of the Commission, which must approve any such dispositions that are "consistent with the public interest." *16 U.S.C. § 824b*(a); *Northeast Utils. Serv. Co. v. F.E.R.C., 993 F.2d 937, 947 (1st Cir. 1993)*. Second, § 205 of the FPA requires the F.E.R.C. to ensure that generation and transmission services rates and charges, which public utilities must file with the Commission, are "just and reasonable." *16 U.S.C. § 824d*(a). Third, § 206 of the FPA requires that the F.E.R.C. provide procedures for entities to challenge the regulated practices of a public utility. See *16 U.S.C. § 824e.*

As background, the century-old "filed rate" doctrine is not an antitrust concept but derives from the more general public utility rule that "the rate of the carrier duly filed is the only lawful charge and deviation from it is not permitted upon any pretext." *AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 118 S. Ct. 1956, 1962, 141 L. Ed. 2d 222 (1998)* (quoting *Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 59 L. Ed. 853, 35 S. Ct. 494 (1915))*. The strict application of the rule is necessary to promote the congressional policy of preventing "unjust discrimination" in rates. Id.

Under the "filed rate doctrine," the F.E.R.C.'s authority to determine whether wholesale rates filed by utilities are "just and reasonable" is exclusive. See *Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 371, 101 L. Ed. 2d 322, 108 S. Ct. 2428 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966, 90 L. Ed. 2d 943, 106 S. Ct. 2349 (1986).* Public utilities cannot charge rates for their services "other than those properly filed with the appropriate regulatory authority." *Arkansas La. Power Co. v. Hall, 453 U.S. 571, 577, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981).* Unless the filed rates "are challenged, either by an interested party or on the Commission's initiative, the filed rates become legal rates." *Boston Edison Co. v. F.E.R.C., 856 F.2d 361, 368 (1st Cir. 1988)* (quotation omitted). Parties "aggrieved" by an order of the F.E.R.C. may obtain review of the decision from the United States Court of Appeals. See *16 U.S.C. § 825l*(b); *Northeast Utils., 993 F.2d at 943-44.*

Since the filed rate doctrine vests rate approval exclusively in F.E.R.C., subject to direct appellate review, it necessarily follows that a federal district court cannot make its own determination of what rate is "just and reasonable." "It is now settled that 'the right to a reasonable rate is the right to the rate which the Commission files or fixes, and, . . . except for review of the Commission's orders, [a] court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.'" *Mississippi Power, 487 U.S. at 371* (quoting *Nantahala, 476 U.S. at 963-64)* (other quotations omitted); see also *Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994)* (holding that filed rates are "per se reasonable and unassailable in judicial proceedings brought by ratepayers"). "This principle binds both state and federal courts . . . ." *Mississippi Power, 487 U.S. at 371.*

The filed rate doctrine is applied "out of deference to a 'congressional scheme of uniform regulation'" in order to avoid "impermissibly 'usurping a function that Congress has assigned to a federal regulatory body.'"[6] *County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858, 862 (9th Cir. 1997)* (quoting *Arkansas La. Gas, 453 U.S. at 579 & 582)*, cert. denied, *118 S. Ct. 854, 139 L. Ed. 2d 754 (1998)*. It preserves "the exclusive role of federal agencies in approving rates for . . . services that are 'reasonable' by keeping courts out of the ratemaking process . . ., a function that the federal regulatory agencies are more competent to perform." *Marcus, 138 F.3d 46, 58.*

The filed rate doctrine precludes contract and tort claims in state and federal court when those claims implicate the exclusive rate-approval role of F.E.R.C.. See *Central Office, 118 S. Ct. at 1963* (holding that the filed rate doctrine applies to action challenging services and billing rather than rates or rate setting because rates "do not exist in isolation" and have meaning "only when one knows the services to which they are attached"). The doctrine is "not limited to 'rates' per se" but rather applies when a plaintiff asks for relief of a kind that "directly affects" wholesale rates that have been filed with F.E.R.C. for a particular service. *Nantahala Power, 476 U.S. at 966-67* (holding that, generally speaking, a F.E.R.C. order allocating power could not be interfered with by a state court reallocation under filed rate doctrine); see also *Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614, 616 (11th Cir. 1995)* ("If there was a filed rate covering network service, the damage claim would be precluded by the filed rate doctrine.").

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[6] The filed rate doctrine applies not only in energy regulation but in other industries in which filing of rates or tariffs is required by law. See, e.g., *Marcus v. AT&T, 138 F.3d 46, 58 (2d Cir. 1998)* (telecommunications); *Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 422, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986)* (shipping).

Even if plaintiff's complaint refers to some underlying or distinct conduct, "the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8th Cir. 1992);* see also *Wegoland, 27 F.3d at 19.* As a result, "application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct, . . . the possibility of inequitable results" or "the cause of action the plaintiff seeks to bring." *Marcus, 138 F.3d at 58.* Instead, the doctrine is prudentially applied to exclude from trial court consideration complaints that would require interference with congressionally created federal regulatory processes.

B. Norwood's Claims

Norwood's complaint contains one count for breach of contract and three antitrust counts. Although the thrust of its claims has changed in this fast-forward regulatory picture, at the root of all four counts is the claim that the rates and charges approved by F.E.R.C. as part of NEPCO's settlements and divestiture plan undermine Norwood's competitive viability. Norwood alleges that NEPCO breached its contract with the town by divesting its non-nuclear generation assets, but the damage it asserts is that Norwood is now forced to pay certain wholesale rates and contract termination charges, approved by F.E.R.C., that differ from the rates and charges of NEPCO's affiliates, which were also approved by F.E.R.C.. The three antitrust claims assert four theories of liability under the Sherman and Clayton Acts: (i) that the acquisition of assets by USGen tends "to create a monopoly in the generation and distribution markets" which will artificially raise wholesale prices in New England; (ii) that the fixed rates to be offered by agreement to NEPCO's affiliates by USGen will lead to "lucrative monopoly profits over time"; (iii) that the same acquisition and rate-setting agreement constitutes a "price squeeze"; and (iv) that the imposition of CTC's or stranded costs restricts Norwood from the market for competitive power supply.

1. Antitrust

The filed rate doctrine requires dismissal of the complaint's antitrust counts because it explicitly covers antitrust claims that pin their alleged damages on unfair rates. A plaintiff cannot maintain a claim for damages in district court "on a claim that the rate was the product of an antitrust violation." *Florida Mun. Power Agency, 64 F.3d at 616* (remanding for factual determination of whether there was a filed rate covering the particular service); see also *County of Stanislaus, 114 F.3d at 863* ("The filed rate doctrine precludes antitrust claims seeking damages on the basis of filed rates.").

Norwood essentially claims that the F.E.R.C.-approved market-based rates charged to NEPCO's affiliates and the contract termination charges are the product of antitrust violations, a claim prohibited by the filed rate doctrine because it would ultimately require the Court to assess a just and reasonable rate. See *County of Stanislaus, 114 F.3d at 867* (affirming motion to dismiss). Since the "legal" rate is the one filed with F.E.R.C., Norwood cannot claim an antitrust injury, or seek treble damages, based on the assertion that the rate is illegally high or improper. See *Square D, 476 U.S. at 416-17* (affirming dismissal of antitrust action in the shipping industry).

Norwood makes two arguments in an effort to avoid dismissal under the filed rate doctrine. First, the town points out that "it is undisputed that utilities are 'not immune' from antitrust laws" and that district courts maintain jurisdiction over the antitrust laws, even in cases involving public utilities.

Northeast Utils., 993 F.2d at 946 (quoting *Otter Tail Power Co. v. United States, 410 U.S. 366, 372-75, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)); see also Town of Concord v. Boston Edison Co., 915 F.2d 17, 22-23 (1st Cir. 1990)* (pointing out that antitrust analysis must be "sensitive" to the legal and economic setting of the regulated industry). Norwood further stresses that Congress, in enacting the Energy Policy Act of 1992, recently reconfirmed its commitment to the application of antitrust principles to electric utilities by enacting an "antitrust savings clause" that F.E.R.C.'s expanded jurisdiction over wheeling "shall not be construed to modify, impair, or supersede the antitrust laws." *16 U.S.C. § 824e*(2). Norwood particularly emphasizes the following language from the First Circuit:

> Petitioners may rest assured that were F.E.R.C. to approve a merger of utilities which ran afoul of Sherman Act or other antitrust policies, the utilities would be subject to either prosecution by government officials responsible for policing the antitrust laws, or to suit by private citizens meeting the requirements of standing.

Northeast Utils., 993 F.2d at 948 (citing *Otter Tail, 410 U.S. at 374-75).*

However, Norwood's "no-immunity" argument misses the mark. The cases it points to as examples of federal district courts entertaining antitrust suits in the power industry in spite of the filed rate doctrine do not involve wholesale rates filed with the F.E.R.C.. See *Town of Concord, 915 F.2d at 20-21* (rejecting claim of an antitrust violation involving a price squeeze in the state-regulated retail electric business following a wholesale price increase that had been approved by F.E.R.C. and was not challenged in the court case); *Otter Tail, 410 U.S. at 374-75* (rejecting antitrust immunity in a case involving a power company's refusal to deal with municipalities); *Northeast Utils., 993 F.2d at 943-44* (reviewing F.E.R.C. order under *16 U.S.C. § 8251* rather than an appeal from a district court).

The rule that utilities are not immune from court enforcement of the antitrust laws, as stated in the Northeast Utilities, is not inconsistent with the filed rate doctrine. Courts may entertain antitrust suits involving the electric industry in matters not affecting F.E.R.C.-filed rates or charges. See, e.g., *Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1446 (9th Cir. 1997)* (filed rate doctrine does not apply to antitrust claim of blocking a competitor's entry into market using a covenant not to compete), cert. denied, *140 L. Ed. 2d 824, 118 S. Ct. 1688 (1998).* However, when F.E.R.C.-approved rates and charges are, as here, the subject matter of the suit, F.E.R.C.'s judgment prevails, subject to appellate review. See *Nantahala Power, 476 U.S. at 966-67; Marcus, 138 F.3d at 58-59.*

Second, Norwood contends that the filed rate doctrine does not apply to its claims because the F.E.R.C. only controls "cost-based" wholesale rates as opposed to the "market-based" wholesale rates which are now being allowed. While reliance on the filed rate doctrine as a bright prudential line may be on weaker footing as the electric utility industry returns to the marketplace, no obituary is in order.

When faced with concerns about the monopoly power of a utility, "F.E.R.C. only approves market-based rates when a utility demonstrates that its market power is sufficiently mitigated in the relevant markets." *Cajun Elec. Power Co-op v. F.E.R.C., 307 U.S. App. D.C. 306, 28 F.3d 173, 176 (D.C. Cir. 1994)* (reviewing F.E.R.C. procedures for approving market-based rates); see also *Louisiana Energy & Power Auth. v. F.E.R.C., 141 F.3d 364, 370 (D.C. Cir. 1998)* (affirming

F.E.R.C.'s approval of a provider's application to sell electricity at market-based rates in lieu of cost-of-service regulation where there was a competitive market). An aggrieved party can file a complaint with the F.E.R.C. for any abuses of market power. See *Louisiana Energy & Power, 141 F.3d at 370-71.*

In this case, F.E.R.C. stated it permitted power sales at market-based rates only after determining that the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. *New England Power Co., 82 F.E.R.C. P61,179 at 14 (1998)*. Further, the F.E.R.C. has not abdicated its regulatory role with respect to the tariff charges imposed on Norwood about which Norwood complains most vehemently. When the F.E.R.C. approved the settlements of NEPCO, its affiliates, and the states of Rhode Island and Massachusetts, the Commission explicitly rejected an attempt by the settlers to restrict the F.E.R.C.'s ability to review whether CTCs were "just and reasonable" on a challenge under § 206 of the Federal Power Act. See *New England Power, 81 F.E.R.C. P61,281 (1997)* (letter order) ("A settlement may not restrict the rights of non-settling parties to apply to the Commission for changes in rates pursuant to Section 206 under a 'just and reasonable' standard."). The F.E.R.C. insisted, as it must, that its jurisdiction to review all rates and charges would continue to be governed by the statutory standard of consistent with the "public interest." See id.

2. Breach of Contract

Norwood contends that the filed rate doctrine does not preclude an adjudication by this Court of whether NEPCO, through its sale of assets, breached its 1983 court-approved settlement agreement with Norwood. In its recent opinion approving the contract termination charges, the F.E.R.C. wrote:

> The fact that Norwood is litigating in court the issue of whether NEPCO's voluntary divestiture of its non-nuclear generation facilities constituted a breach of contract on NEPCO's part does not affect NEPCO's right to seek from this Commission an early termination exit fee amendment for its tariff of general applicability.

New England Power Co., 83 F.E.R.C. P61,174 (1998).

Arguably, to the extent the breach of contract claims directly implicate F.E.R.C.-approved rates and charges, the filed rate doctrine may collide head-on with jurisdiction over the court-approved settlement. Treading gingerly, I conclude that the claim of breach of contract fails as a matter of law for two reasons. First, Norwood has not alleged any facts from which this court could reasonably infer a violation of the Settlement Agreement, the Power Contract or this court's decree and order. These require NEPCO to charge Norwood the rates in its tariff of general applicability, Tariff 1, as amended by F.E.R.C.. Norwood argues that NEPCO's divestiture of its generation portfolio and termination of Tariff 1 Service to its larger distributor affiliates, which account fo over ninety-five percent of Tariff 1 service, facilitate the affiliates' access to market-based rates and preclude NEPCO from its obligation to provide all requirements electric service to Norwood under Tariff 1 on a cost of service basis, "under equal wholesale rates to those provided by NEP[CO] to its affiliates." (emphasis added). The problem with this argument is that the underlined language does not appear in the contracts or court order. While the "parol evidence rule does not preclude consideration of background facts that explain the context in which [an] agreement was made," where an integrated contract is not ambiguous, no extrinsic language can be used to "vary or modify its meaning." *SAPC v. Lotus*

Development Corp., 921 F.2d 360, 361-62 & n.2 (1st Cir. 1990).

Norwood next argues that NEPCO violated the agreement by imposing pre-divestiture 'frozen rates' rather than actual post-divestiture cost-of-service rates. Again, the contract merely requires NEPCO to impose Tariff 1 rates but does not specify how the Tariff must be calculated by F.E.R.C.. Finally, Norwood argues it has the contractual right to withdraw its election to extend the Settlement Agreement because the premise for that election was that "neither NEP nor Norwood has a present intention to terminate all requirements service." (Settlement Agrmt. P 4.6.) There is no allegation in the complaint that the representation was fraudulent. Moreover, NEPCO continued to be willing to provide Norwood with all-requirements service, and there is no contractual provision requiring NEPCO to provide all requirements service to its affiliates.

Second, the essence of Norwood's bitterness is that the changed circumstances of the divestiture of the power generation facilities and contracts by NEPCO make it "manifestly illegal and unfair" to hold Norwood to its ten-year extension of the contract. The F.E.R.C. has already resolved this problem by allowing Norwood to break this contract and negotiate for a new power supply. While Norwood challenges the imposition of stranded costs in the amended tariff, this challenge sweeps the parties into the vortex of the filed rate doctrine, which precludes the award of breach of contract damages under state law during a period that a defendant is subject to the jurisdiction of the F.E.R.C.. See *Arkansas La. Power, 453 U.S. at 584.* Even if a rate were filed in violation of a contract, the filed rate doctrine would still bar a court from awarding damages based on the difference between two rates. See *id. at 582 n.12.*

In sum, F.E.R.C. has acted extensively on all three matters from which Norwood seeks damages: (i) NEPCO's sale of non-nuclear assets to USGen/PG&E; (ii) the agreement to "standard offer service" rates for Mass. Electric and Narragansett; and (iii) the assessment of contract termination charges on Norwood due to its early termination of wholesale supply service from NEPCO. In each case, F.E.R.C. has heard objections from Norwood and others protesting the approval of the sales and rates. Also in every case, F.E.R.C., in detailed published opinions, has rejected Norwood's arguments, which have included complaints about the anti-competitive effects of NEPCO's actions. Norwood has appealed to the First Circuit, which is the best forum to resolve whether F.E.R.C.'s public interest analysis lacks sufficient concern for competition. See *16 U.S.C. § 825l*(b).

ORDER

The motions of New England Power Company and New England Electric System (Docket Nos. 53 & 80) and of Pacific Gas & Electric Corporation (Docket No. 81) to dismiss Norwood's Second Amended Complaint are ALLOWED. Defendant's motion to dismiss (Docket No. 3) is DENIED as moot.

PATTI B. SARIS

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF: Case 97cv10818-PBS

Judge Patti B. Saris - pre

Town of Norwood, plaintiff

v.

New England Power, defendant

NOTICE OF ACTION BY THE COURT

Notice To:

Charles F. Wheatley, Jr., Esq.
Wheatley & Ranquist
34 Defense Street
Annapolis, MD 21401

** The following ruling was made on 10/2/98 and entered on the docket.

Judge Patti B. Saris. Endorsed Order entering denying [90-1] motion for partial summary judgment as moot. Notice sent to counsel.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1047

TOWN OF NORWOOD, MA.
Plaintiff-Appellant,

v.

NEW ENGLAND POWER CO.;
NEW ENGLAND ELECTRIC SYSTEM (NEES),;
PACIFIC GAS & ELECTRIC COMPANY,;
PG&E CORPORATION,
Defendants, Appellees.

Before:
Boudin, Stahl & Lipez, Circuit Judges

ORDER OF THE COURT

Entered: February 28, 2000

Upon consideration of the "Petition for Panel Rehearing",
It is ordered that said petition for rehearing is hereby denied.

By The Court

PHOEBE MORSE
PHOEBE D. MORSE, Clerk

cc: Messrs. Wheatley, Jr., Posner, Barns, Erichsen, Chopra, Hestnes, Spaeth, Berlin, Dean, Shoer, Phillips, Brunnell, Bocchino, Jr. & Roberti

Section 1, Sherman Act, 15 U.S.C.A. §1 (1997)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 State. 282; Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12. 1975, Pub.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, Pub.L. 101-588, § 4(a), 104 Stat. 2880).

Section 2, Sherman Act, 15 U.S.C.A. §2 (1997)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 60 Stat. 282; Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, Pub.L. 1901-588, + 4Ob), 104 Stat. 2880).

Section 4(a), Clayton Act, 15 U.S.C.A. §15(a) (1997)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only -----

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacing in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise

providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Energy Policy Act of 1992, 16 U.S.C. 824k(e)(2) (1997)

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms and conditions for wholesale transmission service

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers...

(e) Savings provisions

...(2) Sections 824i, 824j, 824*l*, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of Title 15, except that such term includes section 45 of Title 15 to the extent that such section relates to unfair methods of competition.

Federal Rules of Civil Procedure, *Pleadings and Motions*

Rule 12. Defenses and Objections–When and How Presented–By Pleading or Motion–Motion for Judgment on Pleadings

(b) How Presented: Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ...(6) failure to state a claim upon which relief can be granted... A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Supreme Court, U.S.
FILED
JUN 26 2000
CLERK

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No. 99-1913

In the Supreme Court of the United States

OCTOBER TERM, 1999

TOWN OF NORWOOD, MASSACHUSETTS,
PETITIONER,

v.

NEW ENGLAND POWER COMPANY, NEW ENGLAND ELECTRIC SYSTEM (NEES), PACIFIC GAS & ELECTRIC COMPANY, AND PG&E CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS PACIFIC GAS & ELECTRIC COMPANY AND PG&E CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Respondent Pacific Gas & Electric Co. ("Pacific Gas") is a wholly-owned subsidairy of respondent PG&E Corp. ("PG&E"). PG&E is a publicly traded public utility holding company. PG&E has no parent corporation, and no publicly held company owns 10% or more of its stock.

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RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Pacific Gas and PG&E adopt the Statement of Respondents New England Power Company ("NEP') and New England Electric System ("NEES"). As NEP notes, this lawsuit is essentially a dispute over a power contract between NEP and its former customer, the Town of Norwood ("Norwood"), which arises out of the restructuring of the electric utility industry in Massachusetts and Rhode Island and the divestiture of NEP's non-nuclear power generating assets.

Pacific Gas and PG&E have nothing to do with the underlying dispute between Norwood and NEP. Pacific Gas and

PG&E are involved in this case only because each is (or was) the corporate parent of certain subsidiaries which themselves are only tangentially related to the contract dispute. PG&E, a public utility holding company, is the ultimate parent of USGen New England, Inc. ("USGenNE"), which acquired NEP's non-nuclear generating assets. Pacific Gas is a regulated electric utility serving a franchise service territory located in Northern and Central California. Pacific Gas was the parent of U.S. Generating Company ("USGen"), a California general partnership, which participated in the Massachusetts regulatory settlement leading up to the divestiture of NEP. The only issue raised in the petition that involves respondents Pacific Gas and PG&E, and the only issue addressed in this opposition, is the dismissal by the court of appeals of Norwood's alleged horizontal price fixing claim under Section 1 of the Sherman Act.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Pose Any Novel Or Important Issue With Respect To Section 1 of The Sherman Act Which Should Be Reviewed By This Court.

As Petitioner acknowledges, "[t]he court of appeals dismissed Norwood's Section 1 Sherman Act claim *solely* on the ground that it 'does not constitute horizontal price fixing', but 'is an ordinary vertical transaction' and 'did not set rates for other wholesale suppliers'." Pet. at 14-15 (emphasis added). Indeed, the court of appeals' entire discussion of this issue is contained in one paragraph of its opinion:

> Norwood also makes a section 1 claim that the standard offer rates New England Power promised to other retailers as part of the settlement somehow constitute horizontal price fixing. But offer of those rates to customers is an ordinary vertical transaction, and the settlement did not set rates for other wholesale suppliers; USGenNE's later

> assumption of the obligation is simply the transfer of the seller's existing obligation incident to a sale of assets.

Pet. App. at 22a (footnote omitted).

Petitioner's contradictory assertion that the court of appeals dismissed this claim in reliance on the filed rate doctrine is simply incorrect.[1] The dismissal of the Section 1 claim did not rely upon the filed rate doctrine, or any concept of antitrust immunity. As the court of appeals' opinion clearly states, and Petitioner itself acknowledges, the court of appeals relied solely on the conclusion that the conduct alleged "is an ordinary vertical transaction" that does not offend Section 1. This conclusion is correct, entirely unremarkable, and poses no issue warranting review by this Court. Contrary to Petitioner's argument, the court of appeals' conclusion does not contradict the allegations in the complaint; indeed, Petitioner's brief acknowledges that the "fixed" standard offer rates were only available to NEP's affiliates. Pet. at 4.

---

[1] The court of appeals did rely on the filed rate doctrine in dismissing Petitioner's claim under Section 2 of the Sherman Act, but that claim is not directed at PG&E or Pacific Gas and is addressed in NEP's opposition brief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PACIFIC GAS & ELECTRIC
COMPANY and PG&E
CORPORATION,

By their attorneys,

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RULE 29.6 STATEMENT

New England Power Company, formerly a wholly-owned subsidiary of New England Electric System ("NEES"), is now a wholly-owned subsidiary of National Grid USA, a Delaware corporation.

On March 22, 2000, NEES merged into National Grid USA, an indirect subsidiary of National Grid Group PLC, a public limited company organized under the laws of England and Wales, which is listed on the New York and London stock exchanges.

On April 19, 2000, Eastern Utilities Associates ("EUA") became a wholly-owned subsidiary of National Grid USA. On May 1, 2000, Montaup Electric Company, a subsidiary of EUA, merged into New England Power Company.

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BRIEF IN OPPOSITION

STATEMENT

As set out below, this case involves the routine construction of a power supply contract and the application of settled antitrust principles in the context of complex, fact-specific transactions and regulatory rulings. The petitioner Town of Norwood ("Norwood") fails to present any issue of recurring importance or involving a conflict with decisions of this Court or other courts of appeal. Its petition reduces to nothing more than its dissatisfaction with the decision of the court of appeals in favor of respondent New England Power Company ("NEP"), a decision that is not only unworthy of review but also clearly correct. The petition should be denied.

Factual and Regulatory Background. Norwood owns and operates a municipal utility that distributes retail power to residents and businesses in the town. Pet. App. at 3a. In 1983, Norwood entered into a contract to buy wholesale power from NEP under NEP's FERC tariff No. 1, "as [it] may be amended from time to time." *Id.* In 1989, Norwood exercised an option to extend its contract with NEP until October 31, 2008, terminable on seven years' advance notice. *Id.* at 4a.

During the 1990's, substantial restructuring of the electric power industry took place at both the federal and state level. At the federal level, FERC's Order 888 requires owners of wholesale transmission lines to afford non-discriminatory access to other sellers of wholesale power, on the same terms the owner provides itself.[1] As a result, customers are able to shop for competitive power from sources beyond the owner of the lines to which they are connected.

Various states have also taken vigorous action to introduce competition at the retail level. Massachusetts' restructuring legislation provides that "[t]he interests of consumers can best be served by . . the functional separation of generation services from transmission and distribution services."[2] Where, as in NEP's case, a utility's restructuring plan preceded adoption of the legislation, the plan may be implemented subject to approval by the Massachusetts Department of Public Utilities.[3] Similarly, Rhode Island's restructuring legislation requires vertically-integrated investor-owned utilities to divest or otherwise spin off at least 15% of their non-nuclear generation assets. R.I. Gen. Laws §§ 39-1-27, 27.2, 27.3.

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[1] 61 Fed.Reg. 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, on rehearing 62 Fed. Reg. 12274 (March 14, 1997), III FERC Stats. & Regs. 31,048, codified at §§ 35.15, 35.26-35.28, *petitions for review pending sub nom. Transmission Access Policy Study Group* v. *FERC*, D.C. Cir. Nos. 97-1715 et al.

[2] Mass. St. 1997, c. 164, § 1(m), reprinted in Mass. Gen. Laws Ann., c. 164, § 1A.

[3] Mass. Gen. Laws c. 164, § 1A(a).

Beginning in December, 1996, after settlement agreements pertaining to its restructuring had been reached among NEP, its affiliates and state regulators, NEP made a series of regulatory filings, designed to (1) secure FERC approval for the sale of its non-nuclear generating facilities to USGenNE ("USGen"), a subsidiary of PG&E Corporation, and (2) permit NEP's affiliates, Massachusetts Electric Company ("Mass Electric") and The Narragansett Electric Company ("Narragansett"), to terminate their wholesale power contracts with NEP, subject to a payment to compensate NEP for the costs of early termination. Pet. App. at 4a. In addition, at the request of the Massachusetts and Rhode Island utility commissions, NEP's proposed restructuring included a wholesale "standard offer service" to its affiliates, who, in turn, were required to offer parallel retail standard offer rates to their own customers until they could take advantage of emerging competition. *Id.* at 4a-5a. The wholesale standard offer was not made available to Norwood and other municipal utilities because, unlike investor-owned utilities, they had no obligation to permit competitive access to their customers or afford them retail standard offer rates. *See* Mass. Gen. Laws 164, § 47A; Pet. App. at 21A.

Norwood filed suit in April, 1997, while certain initial filings were under consideration by FERC. Pet. App. at 6a. The district court denied Norwood's motion for a preliminary injunction against USGen's acquisition of NEP's assets. Additional events then occurred that resulted in amendment of Norwood's complaint.

First, the FERC approved the settlement agreements permitting Mass Electric and Narragansett to terminate their wholesale purchase contracts with NEP upon payment of contract termination charges, *New England Power Co.*, 81 F.E.R.C. ¶ 61,281 (1997), reh'g. denied, 83 FERC ¶ 61,265 (1998); approved the wholesale standard offer service, *id.;* and approved NEP's transfer of generating facilities and associated supply contracts to USGen, *New England Power*

Co., 82 FERC ¶ 61,179 (1998), reh'g. denied, 83 FERC ¶ 61,275 (1998).

Second, on March 4, 1998, Norwood notified NEP that as of April 1, 1998 it was entering into a long-term contract with another wholesale supplier. Pet. App. at 6a. In response, NEP filed an amendment to its FERC Tariff No. 1 permitting Norwood and other non-settling wholesale customers to terminate their contracts early, on 30 days' notice, upon payment of a contract termination charge. *Id.* at 7a. This charge was calculated by crediting, against the revenues expected for the remainder of the contract, the market price of power and transmission costs that would be avoided as a result of not providing service. *Id.* The FERC approved the contract termination charge. *New England Power Co.*, 84 FERC ¶ 61,175 at 61,920 (1998).

Proceedings Below. As amended, Norwood's complaint alleged that NEP breached the 1983 power contract by divesting itself of its generating facilities and charging its affiliates different rates (*i.e.*, the standard offer) than Norwood. Norwood further claimed that the contract termination charge imposed on it (and approved by the FERC), in combination with the standard offer, constituted an illegal price squeeze. Finally, Norwood asserted that NEP and USGen had conspired to fix prices in the wholesale market, and that USGen's acquisition of NEP's non-nuclear generating assets violated the Clayton Act.

The district court granted NEP's motion to dismiss under the filed rate doctrine and on the ground that Norwood had not stated a claim for breach of contract. Pet. App. at 7a-8a.

The court of appeals affirmed. First, the court held that because the power contract only required NEP to supply power under its tariffed rate, Norwood had failed to state a claim for breach based on an anticipated change in the calculation of that rate resulting from NEP's divestiture of its generating assets, or based on NEP's declining to make the standard offer available to Norwood. "[W]e agree with the district court that the contract did not contain a promise that ownership of New England Power's facilities or equality of treatment vis a vis New England Power's affiliates would endure." Pet. App. at 13a. Second, the court dispatched Norwood's price-fixing claim on the ground that USGen simply assumed NEP's vertical obligations to its customers (i.e., the standard offer rates contained in the state regulatory settlements) incidental to a sale of assets. *Id.* at 22a.

Third, the court rejected Norwood's price squeeze claim on filed rate grounds, for several reasons: (1) unlike the decisions relied on by Norwood, the FERC regulated both of the tariffs allegedly comprising the squeeze, *id.* at 16a; (2) contrary to Norwood's argument that the relevant rates were "unregulated" market rates, both were "individually filed with the FERC" and "subject to ongoing FERC regulation," *id.* at 17a; (3) any exception for claims seeking declaratory and injunctive relief was inapplicable because "any meaningful relief as to the price squeeze would require the alteration of tariffs [that had been] actually scrutinized repeatedly by FERC," *id.* at 18a; and (4) even if there were room for "cutting back" on the filed rate doctrine, "this case is not a good vehicle . . . because the Sherman Act claims pressed by Norwood are themselves so doubtful." *Id.* at 20a. Finally, despite expressing extreme skepticism, the court concluded that Norwood's Clayton Act claim could not be resolved on a motion to dismiss and remanded that claim to the district court. *Id.* at 25a-28a.

REASONS FOR DENYING THE PETITION

A. NORWOOD PRESENTS NO ISSUE WORTHY OF THIS COURT'S REVIEW.

The decision below involved the application of the filed rate doctrine in a setting involving factually-complex transactions (NEP's divestiture and Norwood's premature termination of the power contract) and a series of fact-specific regulatory decisions. As such, it does not raise any issue of recurring importance that requires this Court to revisit the filed rate doctrine, the limits of which it has already defined in a number of decisions.[4] And even if the Court were otherwise inclined to do so, this case — whose substantive antitrust weaknesses were oft-noted by the court of appeals, *e.g.*, Pet. App. at 14a, 20a, 21a, 26a — hardly presents the appropriate occasion. Moreover, the contract-specific determination of whether a party has stated a claim for breach is clearly a matter that the court of appeals was well-equipped to address and that does not require this Court's consideration.

Finally in this regard, Norwood fails to identify any meaningful conflict between the decision of the court of appeals and the decisions of either this Court or other circuits on any issue relevant to its petition. In the section of its petition challenging the lower court's rejection of its price-fixing claim, Norwood purports to identify a conflict with decisions of "this Court and six different circuits" with respect to the issue of antitrust immunity. Pet. at 15. However, the court of appeals' rejection of Norwood's price-fixing claim had nothing to do with "immunity" and was based on the simple determination that no price-fixing agreement had been alleged. Pet. App. at 22a; *infra* at 7. Norwood also purports to identify a "conflict" based on the court of appeals' application of the filed rate doctrine to its price squeeze claim. Pet. at 18-19. However, no such conflict exists; the cases cited by Norwood all were easily distinguished by the court of appeals on their facts because they involved challenges to the combination of a federally-regulated wholesale rate and a retail rate that was not subject to federal regulation, whereas Norwood's price squeeze claim rested on the combined effect of two tariffs, both of which not only were subject to FERC regulation, but also had been thoroughly scrutinized by the FERC in challenges brought by Norwood. Pet. App. at 15a-16a.

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[4] *E.g., Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); *Square D Company* v. *Niagara Frontier Tariff Bur.*, 476 U.S. 409 (1987).

Accordingly, Norwood fails to identify any issue worthy of review on a writ of certiorari.

B. THE DECISION BELOW IS CORRECT.

Review by this Court is unnecessary for the additional reason that the decision below is undoubtedly correct. Norwood's first claim of error is that the court of appeals improperly rejected its price-fixing claim. Pet. at 12-15. However, the settlement agreements filed with state regulators in connection with NEP's request to sell its non-nuclear generating facilities to USGen clearly did not involve horizontal "price-fixing." Rather, the agreements simply effected the transfer of NEP's vertical obligations to its customers to another supplier, incidental to a sale of assets. Pet. App. at 22a.[5] Put another way, USGen succeeded to NEP's supply contracts; the two companies did not agree that *each* would charge their respective customers the *same* price.

Norwood next contends that the court of appeals erred by applying the filed rate doctrine to its price squeeze claims. Pet. at 20-22. However, the lower court's holding rested on two equally compelling grounds: (1) unlike the cases sustaining a price squeeze claim where one of the rates involved was not subject to federal regulation, *both* rates alleged by Norwood to constitute the squeeze were regulated, and had been thoroughly scrutinized by, the FERC (Pet. App. at 15a-16a); and (2) Norwood's claim that the doctrine did not apply because the rates were "market based" lacked merit because "the relevant rates and termination charge were individually filed with FERC and are subject to ongoing FERC regulation." *Id.* at 17a.

Norwood's third claim, that the "savings clause" in the Energy Policy Act of 1992, 16 U.S.C. § 824k(e)(2), somehow abolished the filed rate doctrine (Pet. at 22-25), is clearly wrong. By its terms, the provision refers only to limited sections of the Federal Power Act, significantly not those that establish the rate filing requirements, 16 U.S.C. § 824d, *see* Pet. App. at 20a; and in any event the savings clause simply preserved the existing balance between FERC's jurisdiction and the antitrust laws and cannot be read to have overruled the filed rate doctrine ***sub silentio***.

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[5] Norwood's attempt to characterize the court of appeals' decision as conferring antitrust *immunity* on NEP, Pet. at 15-18, clearly is misguided. The lower court simply held that on the facts alleged, there was no price-fixing agreement. Pet. App. at 22a.

Fourth, Norwood contends that the court of appeals, by applying the filed rate doctrine to its claims for declaratory and injunctive relief, misapplied this Court's holding in *Square D*, 476 U.S. at 422 n.28. Pet. at 25-26. However, as the court of appeals correctly observed, in *Square D* the injunctive relief would not have affected any tariffed rate but merely would have assured non-collaborative individual filings by alleged conspirators. Pet. App. at 18a. Here, in stark contrast, "any meaningful relief as to the price squeeze would require the alteration of tariffs — and not merely tariffs subject to regulation but tariffs actually scrutinized repeatedly by FERC . . ." *Id.* Norwood's self-serving relabeling of its claims is, therefore, unavailing.

Norwood's final claim is that the dismissal of its breach of contract claim under Fed. R. Civ. P. 12(b)(6) was erroneous. Pet. at 26-30. The power contract only obligated NEP to supply Norwood pursuant to its FERC Tariff No. 1, "filed with FERC, as [it] may be amended from time to time." Pet. App. at 12a. Norwood's claim, however, is that the contract *really* meant more than it expressly provided, Pet. App. at 10a, and the court of appeals' rejection of that claim was undoubtedly correct. *Id.*

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 99-1913

In The

SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD, MASSACHUSETTS
Petitioner,

vs.

NEW ENGLAND POWER COMPANY,
NEW ENGLAND ELECTRIC SYSTEM (NEES),
PACIFIC GAS & ELECTRIC COMPANY,
PG&E CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The First Circuit

REPLY BRIEF OF TOWN OF NORWOOD TO BRIEFS IN OPPOSITION BY RESPONDENTS

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In The

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PACIFIC GAS & ELECTRIC COMPANY,
PG&E CORPORATION,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The First Circuit

REPLY BRIEF OF TOWN OF NORWOOD TO BRIEFS IN OPPOSITION BY RESPONDENTS

Contrary to Respondents' claims that "the Petition does not pose any novel or important issues" and "the decision below is correct", Op. Br. at 5-8, Petitioner, Town of Norwood ("Norwood"), asserts that the case involves important new issues of vital concern to competition in the electric power industry.

The contentions of Respondents in the "factual and regulatory background" and "proceedings below" are inapplicable to the issues before the Court, as discussed *infra*.

1. The court below's ruling that Sections 1 and 2 of the Sherman Act do not apply to price-fixing and price squeeze imposed by Respondents because of the filed rate doctrine conflicts with decisions of this Court and six circuits

Respondents state that Norwood's petition "does not raise any issues of recurring importance that require this Court to revisit the filed rate doctrine." Op. Br. at 5-6. But since the decision below conflicts with this Court's decisions affirming similar price-fixing as a *per se* violation of §1 of the Sherman Act and other decisions relating to price squeeze under §2 of the Sherman Act holding that FERC has no authority to adjudicate the Federal antitrust laws and six circuit courts of appeal, a review of the decision below is important in order to establish the proper scope of the Federal antitrust laws.

Respondents argue that "the decision below is undoubtedly correct" because the private agreements between Respondents to fix prices "did not involve horizontal 'price-fixing.'" [1] Op. Br. at 7. This directly conflicts with the clear facts alleged in Norwood's complaint, which alleged that in a meeting on September 30, 1996, NEP, then one of the largest generators and suppliers of electric power in New England, agreed with other electric power suppliers in New England, including U.S. Generating Co., a subsidiary of Pacific Gas/PG&E, one of the largest electric power suppliers in the U.S., to fix the prices for wholesale power for standard offer service to be paid by NEP's major distribution company affiliates, including Mass Electric and Narragansett, for up to twelve years. The complaint alleged that in the early years, the fixed standard offer prices were below the market price for wholesale power in New England, with the result no other entity could effectively compete for NEP/NEES' electric customers for the first four years of open access, and was a division of territories, which could make Norwood, denied such wholesale service, vulnerable to a takeover by NEP/NEES.[2]

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[1] Respondents' reference to retail restructuring in Massachusetts and Rhode Island (Op. Br. at 2, 3) as applicable to this case, is incorrect. The new, unregulated standard offer wholesale fixed prices, together with the payment of wholesale stranded costs were submitted solely to FERC, and were beyond the jurisdiction of any state regulatory commissions. Neither Respondents nor the court below ever contended that an antitrust immunity existed under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

Subsequent to that time, the fixed prices would escalate sharply above the projected market price for wholesale power. The complaint alleged that this was a scheme designed to allow NEP to sell its generating facilities at a $500 million profit over book value, because the buyer would be guaranteed a locked-in customer base resulting in a division of territories for a number of years during which all competitors seeking to sell wholesale power would be unable to compete for the existing customers receiving standard offer service. After four years, as the rates rapidly escalate, the competitors would be out of the market and the purchaser of the generating assets would reap huge profits. Pet. Supp. App. 64a-65a.

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[2] Pet. Supp. App. 63a-64a. The statement by Respondents that the "wholesale standard offer was not made available to Norwood and other municipal utilities because, unlike investor-owned utilities, they had no obligation to permit competitive access to their customers or afford them retail standard offer rates"(Op. Br. at 3) has no relevance to Norwood's claims for price fixing in violation of Section 1 or to price squeeze under Section 2 of the Sherman Act. NEP's denial of below-market standard offer wholesale service to Norwood was a *per se* unlawful division of territories and created an anticompetitive hurdle to Norwood competing for new retail customers to relocate from NEP's affiliates' service areas to Norwood's service area.

The court below never analyzed or applied the numerous decisions by this Court holding that similar factual situations constituted an illegal price fixing scheme in violation of Section 1 of the Sherman Act. Pet. for *Cert* at 13. These principles have been reconfirmed by this Court in *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990), which rejected a similar claim to that relied upon by the court below that an allocation of markets by competitors is not unlawful unless the market in which the two previously competed is divided between them and cited its decision in *United States v. Socony Vaccum Oil Company*, 310 U.S. 150 at 223 as follows:

> We explained that '[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.'"

498 U.S. at 48.

Respondents' contention that the court below properly dismissed Norwood's price squeeze claims (Op. Br. at 7-8) is also defective. Their claim that a price squeeze only applies when one of the rates involved was not subject to Federal regulation (Op,. Br. at 7-8), conflicts with the express holdings of six separate circuit courts of appeal which also cited this Court's rulings in *California, Otter Tail,* and *Cantor*.

In *Cost Management Services v. Washington Natural Gas*, 99 F.3d 937, 945-46 (9th Cir. 1996), an antitrust action was brought to challenge two rates, both filed at the same regulatory commission as creating a price squeeze in violation of Section 2 of the Sherman Act. The ninth circuit made a thoughtful review of the filed rate doctrine cases by the Supreme Court and concluded that the filed rate doctrine did not apply:

> . . . WNG is essentially asking us to extend Keogh to preclude rate-related suits brought by competitors, as opposed to customers, of regulated entities. The weight of authority, and the better-reasoned authority, supports CMS's argument that Keogh simply does not apply to such suits. *See, e.g.*, [P. Areeda & H. Hovenkamp], *Federal Antitrust Policies*, §19.6 at 660 ("Most courts correctly find that Keogh does not apply to *competitor* suits – for example, suits challenging filed rates as predatory pricing") . . .
>
> The Second, Third and Eighth Circuits have all held that Keogh does not preclude rate-related suits brought by competitors of regulated utilities. *See, In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144 (3rd Cir. 1993), *cert dismissed*, 510 U.S. 1021, 114 S.Ct. 625, 126 L.Ed.2d 589 (1993); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, (8th Cir. 1992), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) ("An anticompetitive practice embodied in a tariff

> may violate the antitrust laws if it . . . impacts upon competitors as opposed to customers."); *Essential Communications Sys., Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1121 (3rd Cir 1979),

Similar results have been reached by the Seventh Circuit and First Circuit in upholding antitrust cases for price squeeze under §2 of the Sherman Act based upon wholesale rates filed with the Federal Energy Regulatory Commission. Neither has used the distinction used by the court below that "they involve challenges to the combination of a federally-regulated wholesale rate and a retail rate that was not subject to federal regulation." In *City of Mishawaka v. Indiana and Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1997), *cert. denied*, 436 U.S. 922 (1978), the Seventh Circuit held that the filed rate doctrine did not bar adjudication by the federal courts of a price squeeze under Section 2 of the Sherman Act based on a wholesale rate filed at the FERC, even though the Commission had jurisdiction to consider price discrimination between a wholesale and retail rate under the Federal Power Act. 560 F.2d at 1318-19, *cert. denied*, 436 U.S. 922.

The First Circuit in *Town of Concord, Mass v. Boston Edison Company*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (Breyer, J.) has confirmed that the district court has jurisdiction to consider price squeeze claims under Section 2 of the Sherman Act despite the fact that the wholesale rate involved had been filed with the Federal Energy Regulatory Commission, based on principles not related to whether another rate involved is subject to the jurisdiction of retail agencies:

> The basic legal principles that govern this monopolization case are well settled. Even though Boston Edison is a regulated firm, it has

> no blanket immunity from the antitrust laws. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75 . . . (1973); *see also, Cantor v. Detroit Edison*, 428 U.S. 579, 596 n.35 . . . (1976); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 . . . (1973). The antitrust law relevant in this case makes it unlawful for a firm to "monopolize . . . any part of the trade or commerce among the several States." Sherman Act Section 2, 15 U.S.C. §2(a).

915 F.2d at 21. *See also, Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993).

All of these precedents, including six different circuits, have confirmed that a claimed price squeeze violation of §2 of the Sherman Act based on a rate filed at FERC is not subject to dismissal under the filed rate doctrine, directly contrary to the grounds stated by the court of appeals below. This imposes a major new split among the circuits which is important for this Court to resolve.

2. The court below's ruling that FERC's deregulation of power sales does not affect immunity under the filed rate doctrine is an important new issue of law

Respondents contend that the mere filing of market-based rates grants immunity because they were "filed with FERC" (Op Br. at 7). FERC has ruled that because of deregulation of power supplies, it simply accepted the private fixed price and contract termination agreements between parties without scrutiny or analysis as previously performed under its long-established cost of service just and reasonable standards of the Federal Power Act. *New England Power Co.*, 82 FERC at 61,665.

If the summary dismissal below of Norwood's claims under §1 and §2 of the Sherman Act under Rule 12(b)(6) stands, the price fixing and price squeeze prohibitions of the Sherman Act are no longer relevant to agreements by private parties who will be free to fix anticompetitive prices for the future. This will result in a division of territories controlled by private parties precluding any competition to customers therein. As such, deregulation poses an important new issue as to antitrust immunity at FERC under the filed rate doctrine.

3. The court below's holding that the "antitrust savings clause" enacted by Congress in the Energy Policy Act of 1992 granting FERC authority to order open access in Order 888 does not apply, is important and incorrect

Respondents' argument that the savings clause does not apply to any rate setting power of the FERC is in error. The amended 16 U.S.C. §824k(a) of the Federal Power Act expressly authorized the setting of just and reasonable rates for wholesale transmission services, which provided an underlying basis for FERC's Order 888 under which Respondents crafted these anticompetitive agreements. The plain language and legislative history of the 1992 Act, in effect confirmed this Court's decisions in *California* and *Otter Tail*, as well as the decisions by the circuit courts cited in 1 above which were the controlling law denying immunity on the basis of the filed rate doctrine to such antitrust issues.

4. The court below's ruling that this Court's *Square D* decision does not allow declaratory and injunctive relief under §1 of the Sherman Act is important and incorrect

Respondents claim that the court's denial of such relief because "any meaningful relief . . . would require the alteration of tariffs" (Op. Br. at 8) directly conflicts with the affirmance by this Court in *Square D* of the Second Circuit's decision by Judge Friendly holding to the contrary, citing *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 455 (1944) where this Court "dismissed the damage claims on the authority of *Keogh* but went on to hold that the state could maintain a suit to enjoin the alleged rate fixing conspiracy." *Square D. Co. v. Niagara Frontier Tariff Bur.* , 760 F.2d 1347 at 1358, 1364-1366 (2d Cir. 1985), *affirmed in relevant part*, 476 U.S. 409, 422 n.28 (1986).

5. The court below improperly dismissed Norwood's complaint for breach of contract under Rule 12(b)(6) without discovery, summary judgment procedures, or trial, contrary to long-standing precedents of this Court

Respondents assert that the "power contract only obligates NEP to supply Norwood pursuant to its FERC Tariff No. 1, filed with FERC as [it] may be amended from time to time." Op. Br, at 8. This directly conflicts with the plain language of the power contract alleged in the complaint that "In the event of any conflict between the provisions of the Contract and the provisions of NEP's FERC Tariff, the provisions of this Contract shall control." NEP's unilateral filing of a $78 million contract termination charge against Norwood twice as high as that to its affiliates (who alone were subject to stranded cost charges under Order 888), directly conflicted with the express language of the contract requiring Norwood to pay only for electric service provided by NEP to Norwood, which precludes any unilateral claim by NEP for liquidated damages for power not delivered. Pet. Supp. App. 61a-62a. The court below never addressed this allegation when it dismissed Norwood's complaint under Rule 12(b)(6), and disregarded the allegations of the complaint as to the proper meaning of "Tariff No. 1" as requiring a cost of service rate, not the converted fixed rate ordered by the FERC no longer supported by NEP's cost of its divested generating plant, and the allegations as to "frustration of purpose" alleged in the complaint based on NEP's divestiture and termination of equal cost of service regulation to its affiliates, which was the underlying premise of the 1983 Antitrust Settlement Agreement and Power Contract. The court also disregarded Norwood's affidavits and its motion to amend the complaint which the district court admittedly never considered. Pet. App. 33a.

The rulings below clearly conflict with the well-established rule in *Jenkins v. McKeithen*, 395 U.S. 411, 421-422 (1969) ("For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted . . . the complaint is to be liberally construed in favor of the plaintiff. . . . The complaint should not be dismissed unless it appears that appellant could 'prove no set of facts in support of his claim which would entitle him to relief.'"); and *Square D Co. v. Niagara Frontier Tariff Bur.*, 760 F.2d 1365-66 (2d Cir. 1985), *affirmed in relevant part*, 476 U.S. 409 (1986) (opportunity to amend should be granted).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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August 11, 2000

SUPPLEMENT TO APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

TOWN OF NORWOOD,)
MASSACHUSETTS)
566 Washington Street)
Norwood, Massachusetts 02062)
)
Plaintiff,)
)
v.)
)
NEW ENGLAND POWER CO.)
25 Research Drive)
Westborough, Massachusetts 01582)
)
and) Case 97-CV10818-PBS
)
NEW ENGLAND ELECTRIC)
SYSTEM (NEES)) Jury Trial Requested
25 Research Drive)
Westborough, Massachusetts 01582)
)
)
and)
)
PACIFIC GAS & ELECTRIC)
COMPANY)
77 Beale Street)
San Francisco, California 94105)
)
and)

PG&E CORPORATION)
One Market, Spear Tower Suite 2400)
San Francisco, California 94105)
)
Defendants.)

SECOND AMENDED COMPLAINT

Plaintiff, the Town of Norwood, Massachusetts, a municipal corporation organized and existing under the laws

Norwood terminating service under NEP's dictated 10-year frozen Tariff 1 proposal.[1]

10. On March 18, 1998, NEP, in a filing to the FERC, agreed to Norwood's change of supplier but, despite NEP's then confirmed position as an unregulated market-based power supplier not subject to the FERC's regulated cost of service ratemaking, filed a purported amendment to its Tariff 1 at FERC, applicable only to Norwood, which seeks to require Norwood to pay NEP $78 million in charges related to its divested power supply facilities. NEP's proposed amendment breaches the Power Contract approved by the Decree and Order of April 12, 1983, which contains no such authorization. The Power Contract requires only that NEP provide "all-requirements electric service to Norwood under NEP's FERC tariff, which NEP agrees to provide." That Power Contract expressly provides that "in the event of any conflict between the provisions of NEP's FERC Tariff, the provisions of this Contract shall control." NEP's termination of the required service by selling its low cost power supply facilities, converting Norwood's contract to a fixed price from cost based, and terminating equal service to Norwood as that provided to its large affiliates, bars it from seeking other compensation for non-performing, divested power supply facilities through a tariff amendment inconsistent with the basic Power Contract. NEP's filing as a market-based supplier was not based on any cost of service regulatory standard and does not constitute a filed rate to give it immunity under the Federal antitrust laws. The filing, to the

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[1] - See NEP letter of March 9, 1998 to Norwood, Appendix B hereto.

extent it seeks stranded costs, is unauthorized since the Commission's Regulations do not permit a seller (NEP) to recover any stranded costs where the buyer (Norwood) takes transmission service from another utility namely, Boston Edison Company. 18 C.F.R. § 35.26 (a) and (b)(i). The Settlement Agreement and Power Contract approved by this Court's Decree and Order of April 12, 1983 expressly provide that Norwood is a transmission customer of Boston Edison Co. Boston Edison was required to wheel power to Norwood in an antitrust settlement agreement approved by the Court in April 1980. The $78 million in new charges would require Norwood to pay NEP over $40 million more for wholesale power than NEP's affiliates would pay under the ("Standard Offer"), is an attempt to raise Norwood's cost of providing retail service and will (1) cripple Norwood in its retail competition with NEP's distribution affiliates, and (2) render the Norwood distribution utility vulnerable to hostile takeover by NEP's parent, NEES.

11. By agreeing to transfer all of NEP's non-nuclear generation assets and purchased power contracts to an unregulated business enterprise and, at the same time, agreeing to fix "Standard Offer" prices for wholesale sales by NEP and its assigns to its affiliates (while refusing to offer such prices to Norwood), from this same unregulated enterprise for up to twelve years at an agreed upon, fixed price structure, the Defendants are, by private agreement, effectively converting a regulated monopoly into an unregulated monopoly. Subsequent to the generation asset sale by NEP to the control of defendant Pacific Gas & Electric Co., and its new parent PG&E Corp ("PG&E"), the sale of over 95% of the requirements wholesale power in New England to NEP's affiliates will be unregulated by the FERC under the terms of the "Stipulation and Agreement" of

September 30, 1996. Moreover, the fact that the purchaser is paying $500 million over book value for NEP's generating plant means that it must anticipate charging prices for power in the future that will exceed the present regulated prices set by the FERC for NEP, which are based on NEP's book value cost-of-service.

12. As part of the proposed generation asset sale at a premium of $500 million over book value, NEP, in conjunction with others, has agreed to fix the prices at which PG&E will sell back electric power at wholesale to NEP's affiliates for their existing retail customers. These agreed upon prices and are identical to those contained in the Stipulation and Agreement of September 30, 1996 for "Standard Offer Service" in Section 5.1:

Calendar Year	Price Per Kilowatt Hour
1998	3.2 cents
1999	3.5 cents
2000	3.8 cents
2001	3.8 cents
2002	4.2 cents
2003	4.7 cents
2004	5.1 cents
2005	5.5 cents
2006	5.9 cents
2007	6.3 cents
2008	6.7 cents
2009	7.1 cents [2]

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[2] The fixed prices from 1998 to 2004 are for both Mass. Electric and Narragansett, which are competitors with

13. These fixed prices escalate by 60% over the seven-year period 1998 to 2004, and 122% through 2009. However, for the first four years, these fixed prices are substantially below the wholesale market prices in New England. They are below the prices Norwood was able to obtain in that market in its new contract with NU, the lowest bidder. This price fixing gives NEP's affiliates and NEES' subsidiaries an anticompetitive advantage over Norwood, by allowing NEP's affiliates to have a lower wholesale price than the market price. This allows NEP and its affiliates and NEES to retain their present customers and attract Norwood's customers for the initial four years. NEP and NEES refused to make the Standard Offer Prices available to Norwood.

14. After the four years in which most customer relationships will be set, the fixed Standard Offer Prices are well in excess of reasonably anticipated competitive market prices and greatly exceed cost-of-service prices for NEP's non-nuclear generating capacity. These high price levels in a largely captive market explain why PG&E agreed to pay NEP a $500 million premium for these generation assets.

15. This pricing agreement establishes privately-fixed benchmark prices under which virtually all of NEP's and NEES' existing retail customers, can purchase electric power

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Norwood for new customers or relocation of existing customers. The fixed prices from 2005 to 2009 apply to NEP's affiliate Narragansett.

at below market prices [3] for the first four years, and thus will exclude other suppliers from the market and prevent Norwood from attracting customers to its system and disadvantage Norwood in retaining its customers. After the first four years, the price fixing will also establish an inflated future reference point for all electricity sellers in the NEP control area. That is so because, as all potential sellers will know, the lion's share of regional power requirements in the NEP control area must necessarily come from these very generating plants for many years. Network voltage and stability requirements, capacity import limitations, and limited in-area alternative resource availability all mean that it will be physically impossible to supplant most of the output of these plants in the foreseeable future. Because of these basic engineering facts, the Defendants' above-cost and above-market price fixing agreement will not be vulnerable to the competitive market discipline of new entry, and will actually serve as a benchmark to inflate the future offering prices that may be made by those potential new entrants who are able to gain limited access to the market. The inevitable effectiveness of this price fixing agreement in what will necessarily continue to be a largely captive (but unregulated) geographic market explains why NEP was able to obtain and why PG&E was willing to pay a $500 million premium for the exclusive purchase of all of NEP's non-nuclear generating assets and wholesale power purchase contracts. Norwood submits that this is an unlawful price fixing agreement, in violation of Section 1 of the Sherman Act, U.S.C. § 1, which will sustain prices well above a competitive market price level.

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[3] NEP's distribution affiliates may also buy a portion of their Standard Offer requirements from other generators to the extent that it may be available at lower prices, but, as explained herein, this is likely to be minimal.

16. The FERC has confirmed that the "Standard Offer Prices" fixed by NEP and PG&E are not based on FERC regulated cost of service, but are derived from NEP's and PG&E's power to enter market-based rates. *New England Power Co.*, 82 FERC ¶ 61,179 at 61,665 (1998). This precludes any claim of antitrust immunity, because the rates contained therein are not FERC approved cost-of-service based rates but are rates determined by the private parties to the agreement on a discriminatory, non-regulated basis.

17. NEP's filing of a purported amendment to its abandoned Tariff 1 service, applicable only to Norwood, to charge it not for any power supply but for NEP's divested power supply facilities, conflicts with the Settlement Agreement and Power Contract approved by this Court's Decree and Order of April 12, 1983 and conflicts with Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. NEP's imposition of a new substantial penalty payment for alleged "stranded costs" upon Norwood, which is designed to force Norwood to underwrite NEP's proposed divestment plan even though it is NEP, not Norwood, that has made service impossible under the existing Power Contract by effectively terminating Tariff 1 service whereby Norwood could receive the equal wholesale power supply as that provided by NEP to its affiliates. The stranded costs of $78 million which NEP unilaterally filed against Norwood alone at the FERC, is approximately twice as high, proportionately, as the charges NEP agreed to with its subsidiary Mass. Electric and Narragansett. Norwood submits this stranded cost penalty payment is an unlawful restraint of trade arrangement and price squeeze which seeks to improperly

raise Norwood's cost of providing retail electricity from accessing competitive markets for replacement power.

18. The foregoing acts by defendants violate Section 7 of the Clayton Act, 15 U.S.C. § 18, Section 1 of the Sherman Act, 15 U.S.C. § 1, Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14.